



## Women's Rights in Armed Conflict under International Law

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## CHAPTER 2. AN OVERVIEW OF LAWS AND INSTITUTIONS

The fragmented protection of women's rights in conflict presents analytical, as well as doctrinal and institutional, challenges. It is increasingly difficult to fully appreciate the role of international law in setting and enforcing rules and providing accountability and redress for violations of women's rights in conflict. The challenge is primarily attributable to the concurrent and overlapping operation of International Humanitarian Law (IHL), International Criminal Law (ICL), International Human Rights Law (IHRL) and the United Nations Security Council (UNSC). This chapter sets out to improve analytical clarity, by providing a functional account of how the respective regimes differ along key lines, namely their sources in law; the underpinning definitions of conflict and women's rights; and the attendant monitoring bodies and enforcement procedures.

Different sources of law can give rise to uncertainty around who is bound by any given legal or normative instrument. Uncertainty may also surround the legal status of a particular law or norm,<sup>1</sup> in particular whether a hierarchy of norms and obligations must be observed.<sup>2</sup> While the topic of the making and sources of international law

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1 See generally Shelton, D. (2001). *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press.

2 Shelton, D. (2006). Normative Hierarchy in International Law. *American Journal of International Law*, 100(2), 291-323.

dominates most introductory works,<sup>3</sup> specifically feminist discussion of international law sources has been notably sparser.<sup>4</sup> To the extent that it has motivated feminist analysis, discussion has principally focused on the typically weak and ‘soft law’ basis of many of the most progressive articulations of women’s rights, outside of the formal sources of law as set-out in article 38 of the Statute of the International Court of Justice. The discussion in this chapter reveals how the differing sources of law of IHL, ICL, IHRL and the UNSC has been a critical factor in shaping feminist engagement and the potential for effective women’s rights protections within each regime.

The terms ‘conflict’ and ‘women’s rights’ imply little conceptual or legal clarity. A defining feature of feminist critique of international law and armed conflict is the distance between legal definitions of conflict and women’s daily-lived experience. However, IHL, ICL, IHRL and the UNSC differ in important ways in their underpinning definitions of conflict. No definition is necessarily more or less ‘woman-friendly’. The significance of the conflict-definition is instead that it determines the regime – or regimes – of relevance. Likewise, there is no consensus

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3 See, for example, Shaw, M. N. (2003). *International Law* (6th ed). Cambridge: Cambridge University Press, 69-126.

4 But see Charlesworth, H. (2012). Law-making and sources. In J. Crawford & M. Koskeniemi (Eds.), *The Cambridge Companion to International Law* (pp. 187-202). Cambridge & New York: Cambridge University Press and Charlesworth, H., & Chinkin, C. (2000). *The Boundaries of International Law: A Feminist Analysis*. Manchester: Manchester University Press. 62-69.

definition of ‘women’s rights’. Indeed, even the language of ‘women’s rights’ might be deemed more or less appropriate depending on the regime of focus. The definition of women’s rights differ in important ways in their narrowness and breadth, for example, in whether emphasis is given to grave physical harm to the female body, or to more quotidian matters of women’s access to food and shelter. The chapter elucidates these key sites of divergence between the regimes.

The relevant laws are implemented by separate institutions with widely varying powers of monitoring and enforcement, such as the International Committee of the Red Cross (ICRC), the International Criminal Court (ICC), human rights treaty monitoring bodies and the UNSC. Concerns arise around the robustness of the attendant monitoring body and enforcement procedure. Who interprets, applies and potentially enforces relevant norms and obligations? From an institutional perspective, it is far from clear that progressive normative development on women’s rights in conflict is accompanied by meaningful accountability. The chapter offers a critical overview of the key monitoring bodies and enforcement procedures attendant to each regime, in particular in their regulation of women’s rights in conflict.

The chapter considers, in turn, the sources of law, definitions of conflict and women’s rights, monitoring bodies and enforcement procedures. It critically considers the strengths and weaknesses of each regime in the regulation of women’s rights in conflict. The chapter provides essential context for examining synergies, interactions and reinforcements across the regimes in the remainder of the book.

## **Sources of Law**

The regimes find their bases in different sources of international law, emerging at different times, which in turn imply different constellations of state parties. The different temporal development and legal basis of the regimes also has implications for regime openness to more progressive feminist interpretation and implementation. Although not the subject of significant feminist reflection, this section demonstrates that the sources of law of the respective regimes have been important – even determinative – in shaping feminist engagement and the potential for effective women’s rights protection within each regime. Specifically, because IHL was the first to emerge, it now represents the least dynamic regime in terms of its sources. Feminist focus has been confined to interpretation and application of IHL, with little meaningful prospect to influence law-making. By contrast, the relatively recent and highly dynamic emergence of ICL offered considerable scope for feminist influence on foundational documents, most notably the Rome Statute. IHRL, uniquely in terms of the regimes under study, includes a dedicated treaty for the protection and promotion of women’s rights, which has been applied in novel and important ways to questions of conflict and has informed the interpretation the broader gamut of international human rights treaties. Finally, while the UNSC’s Charter basis offered a circumscribed basis for the protection of women’s rights in conflict, changes in the broader political environment has prompted the Council to take on a more clearly law-making role in the post Cold War era. Interestingly, this has manifested prominently in respect of women’s rights and humanitarian concerns in conflict. Questions persist, however, as to the appropriateness, legitimacy and legality of the UNSC’s growing role in international law-making. This section elucidates these dynamics more fully.

### *International Humanitarian Law*

In principle, due to its focus on humanitarianism and civilian protection, IHL suggests itself as the regime potentially of most interest to advocates of women's rights in conflict. In practice, however, IHL has attracted, relatively speaking, less feminist engagement.<sup>5</sup> The sources of IHL have had important implications for the regime's capacity and potential to offer meaningful protection to the lives and rights of women in conflict. Its sources have proven exclusionary on two fronts: firstly, the stagnant treaty development since 1977 has offered little opportunity for feminist advocacy to influence the canon's foundational texts. Secondly, the reliance on customary international law to progressively develop the canon further privileges state practice in international law-making, irrespective of the broad exclusion of women from leadership and decision-making in most states.<sup>6</sup>

IHL is the oldest body of law under consideration,<sup>7</sup> inaugurated long before formal feminist engagement with international law. Originating with the 1864 Geneva

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5 See further Gardam, J. (2013). A New Frontline for Feminism and International Humanitarian Law. In M. Davies & V. E. Munro (Eds.), *The Ashgate Research Companion to Feminist Legal Theory* (pp. 217-232). London & New York: Routledge, noting that feminist engagement with IHL has tended to be confined to its criminal element.

6 Charlesworth, H., Chinkin, C., & Wright, S. (1991). Feminist Approaches to International Law. *American Journal of International Law*, 85, 613-645.

7 See Gallen, J. and Smith, C. (2014). Cáin Adomnáin and the Laws of War. *Journal of the History of International Law*, 16, 1, 63–81, on its roots in Brehon law.

Convention and the establishment of the ICRC, it was the horrific experiences of the Second World War that precipitated the ever-expanding corpus of modern IHL.<sup>8</sup> Foundational are the four 1949 Geneva Conventions and three Additional Protocols, alongside a raft of global conventions prohibiting the use of certain types of weapons, such as anti-personnel mines<sup>9</sup> and cluster munitions.<sup>10</sup> The purpose of IHL is not to outlaw the use of armed force, but rather to ensure that any use of force remains within certain parameters.<sup>11</sup> It seeks to limit the impact of conflict on those who do

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8 Palmieri, D. (2013). An Institution Standing the Test of Time? A Review of 150 Years of the History of the International Committee of the Red Cross. *International Review of the Red Cross*, 95, 1–26.

9 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 UNTS 211.

10 Convention on Cluster Munitions, 30 May 2008, 2688 UNTS 39.

11 At its core, IHL is guided by the balancing of four fundamental principles: distinction between civilians and combatants; proportionality in attack; precaution in attack; and military necessity. These principles stress that the use of force within war is not unlimited, and attempt to ensure that combat is conducted in the most humane way possible without frustrating the military necessity to achieve an advantage over the enemy. The principle of distinction requires belligerents to distinguish between civilians and combatants, as well as civilian and military objects, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3,

not participate in hostilities, such as civilians, and those who no longer take part, such as wounded combatants or prisoners of war. The International Court of Justice considers that for humanitarian law, ‘one of the paramount purposes... is to protect civilian life’.<sup>12</sup> Combatants are also protected in certain ways, even when taking part in hostilities; for example, there are limitations on the types of weapons that can be

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article 48. Proportionality is twofold. First, it obliges belligerents only to use as much force as necessary in attack so as not to cause excessive loss or injury to civilians in relation to the military advantage gained, Protocol 1, article 51(5)(b), The principle of precaution requires commanders to take constant care in carrying out attacks to spare civilians by placing military objects and objectives away from civilian populations and objects, to avoid and minimise loss of life to civilians in their use of weapons, and to give an effective warning if circumstances permit, Protocol 1, article 57. Military necessity is the counter-balance to the three other principles and recognises that international law authorises the use of armed and lethal force in certain circumstances. However, when an army or armed group engages in the use of force, they are required to consider both prevailing military and humanitarian considerations: in other words, to balance the expected military advantage to be gained with the direct or collateral damage which may occur.

<sup>12</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, General List No. 131, paragraph 162.



used against them, bearing in mind that it is not unlawful to kill combatants during fighting.<sup>13</sup>

IHL has a strong treaty basis, much of which has now reached the level of customary law that is binding on all states irrespective of treaty ratification.<sup>14</sup> Contemporary IHL is codified in the Geneva Conventions of 1949 and supplemented by the Additional Protocols I and II of 1977. Each of the treaties noted has a somewhat different focus. Geneva Conventions I and II cover wounded and stranded soldiers on land and sea,

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13 Dinstein, Y. (2016). *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge: Cambridge University Press, 72–101. Belligerents are prohibited from using weapons that will cause ‘superfluous injury or unnecessary suffering’, such as anti-personnel mines or biological weapons, Protocol 1 (n 11), article 35(2).

14 Customary law is defined as a practice which states generally recognize they are obliged to perform, or a ‘general practice accepted as law’. Statute of the International Court of Justice, 26 June 1945, 1055 UNTS 993, article 38. To reach the status of customary IHL, it must be reflecting in the actual practice of states (four criteria inform this determination, namely duration, uniformity, consistency of practice and generality of practice), and *opinion juris et necessitates* is the requirement that nations must engage in the identified uniform and general practice out of a sense of legal obligation, as opposed to courtesy, fairness or morality. See also *North Sea Continental Shelf*, 1969 ICJ Reports 3, 41-42; *S.S. Lotus Case* (Fr. v. Turk.), 1927 PCIJ (series A) No. 10 (Sept. 7). On custom as a source of international law, see Shaw (n 3), 72-93.

respectively, while Geneva III regulates the treatment of prisoners of war, and Geneva IV focuses on the lives of civilians in times of war and occupation. The first Additional Protocol (1977) supplements the four Geneva Conventions and applies also to armed conflict between a State and a national liberation movement. The second Additional Protocol (1977) addresses non-international conflicts. Both the Geneva Conventions and the Additional Protocols have been widely ratified. Thus, much of Geneva Law, although not yet all of the Additional Protocols I and II, are now regarded as reflecting customary law and constitute the main body of IHL.<sup>15</sup>

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15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (n 12), paragraph 89. There are still significant states that are not yet parties to the two Protocols, in particular the US. The importance of customary law is emphasized by the principle in the so-called Martens Clause, first enunciated in the Hague Conventions and later in the Geneva Conventions, for example, GC1, article 63. Protocol I (n 11), article 1(2) reaffirmed the application of the principles in cases not covered by the Protocol or by other treaties: ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’. The preamble to Protocol II has a simpler version, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609

The question of the customary character of the rules applicable in non-international armed conflicts (NIAC) is particularly important for several reasons.<sup>16</sup> First, as the first instrument entirely dedicated to non-international armed conflicts, Protocol II contains twenty-eight articles, which develop and elaborate the law applicable to these conflicts. However, contrary to the Geneva Conventions, it has not gained universal acceptance.<sup>17</sup> It is therefore important to establish which provisions of Protocol II are part of customary international law and thus binding on non-parties.<sup>18</sup> Further, customary rules of international law governing non-international armed conflicts are binding on all parties to such conflicts, irrespective of questions of applicability of the Protocol for insurgents.<sup>19</sup> Finally, as noted, feminist international lawyers criticise customary international law as particularly exclusionary to women and gender concerns, due to the broad under-representation of women from leadership roles in state decision-making.<sup>20</sup>

In line with broader developments in the treatment of women's rights under international law, the decades since 1990 have involved feminist recuperative efforts in IHL. An important factor regarding the protection of women's rights under IHL is

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16 Meron, T. (1989). *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 72.

17 As of April 2018, 186 states are party to Protocol II (n 15).

18 Meron (n 16), 72.

19 Ibid.

20 See further Inter-Parliamentary Union. (2018). *Women in Parliament in 2017: The Year in Review*. Geneva: IPU.

the widespread consensus that further treaty developments, beyond limitations on specific weapons, are no longer possible. This consensus is grounded in concern that modern states, given the option, would not choose to limit their belligerent behaviour in the ways previously submitted to under Geneva law.<sup>21</sup> Proposals for a distinct Protocol to the Geneva Conventions addressing women's rights in conflict, while popular for a period,<sup>22</sup> quickly abated in the mid-1990s due to recognition of the potential vulnerability of the foundational IHL treaties and their largely customary status. Thus, unlike the other regimes of relevance, IHL has offered little prospect to women's rights advocates of progressive new law-making.<sup>23</sup>

Alternative ideas for enhanced protection of women's rights under IHL have largely focused on exploiting interactions between the regimes. Such proposals included the

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21 See, for example, Gardam, J., & Jarvis, M. (2000). Women and Armed Conflict: The International Response to the Beijing Platform for Action. *Columbia Human Rights Law Review*, 32, 1-65, 57.

22 See, for example, Gardam, J. (1997). Women and the Law of Armed Conflict: why the silence? *International and Comparative Law Quarterly*, 46, 55; Gardam, J. (2005). The Neglected Aspect of Women and Armed Conflict - Progressive Development of the Law. *Netherlands International Law Review*, 197-219.

23 The highly specific nature of Protocol III, which involved the imposition of effectively no new obligations on state parties, does not constitute a departure from the stagnant treaty development in IHL, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

possible drafting of a Convention on Violence Against Women, perhaps based in part on the General Assembly Declaration on the same topic.<sup>24</sup> This could include violence in conflict and would address lacunae in existing treaty law both in the area of human rights and humanitarian law. Alternatively, such an instrument could be appended as a Second Optional Protocol to the Women's Convention,<sup>25</sup> to be monitored by the CEDAW Committee.<sup>26</sup> Scholars and advocates also looked to potential soft law development, in the absence of new treaty-making potential.<sup>27</sup> For example, by

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24 For a contemporary iteration of this argument, see McQuigg, R. (2017). Is it Time for a UN Treaty on Violence Against Women? *International Journal of Human Rights*, 22(3), 305-324.

25 See Gardam and Jarvis (n 21), at 56. For a full overview of possibilities and recommendations for a treaty on violence against women, see United Nations Special Rapporteur on Violence Against Women (2015). Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Human Rights Council. UN Doc. A/HRC/29/27 (June 10, 2015).

26 Ibid. It could also be subjected to the individual complaints and inquiry procedures available in the current Optional Protocol to the Women's Convention, thus helping to develop jurisprudence in the area.

27 Bennoune, K. (2006). Do we need New International Law to Protect Women in Armed Conflict? *Case Western Reserve Journal of International Law*, 38, 363. at 387-390 summarizes the various proposed initiatives in detail. Gardam, J. (2005). 'The Neglected Aspect of Women and Armed Conflict - Progressive Development of the Law.' *Netherlands International Law Review* 197-2. She cites the following reports:

means of a General Assembly resolution, or Guiding Principles analogous to those addressing Internal Displacement developed by the Special Representative to the Secretary General Francis Deng.<sup>28</sup> Gardam and Jarvis proposed the full text of such a set of Guiding Principles on the Protection of Women Affected by Armed Conflict.<sup>29</sup> Notably, these proposals have looked outside of IHL, primarily to IHRL, in order to advance the protection of women's rights in conflict.

Ultimately, it is the most modest recuperative efforts, led by the ICRC,<sup>30</sup> that have had the most practical significance. In the absence of potential new law-making, institutional efforts to improve the regime's gender sensitivity have been led by the

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United Nations Secretary-General (2002). Report of the Secretary-General on Women, Peace and Security. Security Council. UN Doc. S/2002/1154; United Nations Special Rapporteur on Violence Against Women (2001). Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/2001/73, paragraphs 18, 19, 66; Fourth World Conference on Women, Action for Equality Development and Peace, Beijing Declaration and Platform for Action, UN Doc. A/Conf.177/20 (1995); Special session of the UN General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', Unedited Final Outcome document, 'Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action', 10 June 2000, paragraph 12.

<sup>28</sup> Gardam and Jarvis (n 21), 58.

<sup>29</sup> Ibid, 58-67

<sup>30</sup> This chapter discusses the role of ICRC vis-à-vis IHL *infra* text at n 312.

ICRC and have focused on improved interpretation and operational implementation of existing law. These recuperative efforts have focused on progressive interpretation of existing treaty-based and customary IHL obligations, to include more direct articulation of women's experience of conflict. The ICRC's recognition of rape as a grave breach of the Geneva Conventions, as a matter of customary IHL,<sup>31</sup> is the highest-profile but by no means the most significant of such activities. Further, a focus on improved operationalization of existing legal commitments has been site of productive engagement.<sup>32</sup> Most notably, the 2001 study on *Women Facing War* made an assessment of the needs of women as civilians in armed conflict and as detainees and internees.<sup>33</sup> The study further outlined how the ICRC viewed such needs to already be addressed by IHL and the organisation's operational response to those needs of women. As well as not impacting the sources of IHL, such efforts might also be critiqued for their relatively late emergence.

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31 To clarify the status of rape under IHL, the ICRC issued an Aide-Mémoire in 1992 stating that the grave breach regime in Article 147 GCIV 'obviously not only covers rape but also any other attack on a woman's dignity', International Committee of the Red Cross, Aide-Memoire, 3 December 1992, paragraph 2.

32 International Committee of the Red Cross (2004). *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*. Geneva, ICRC.

33 International Committee of the Red Cross. (2001). *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*. Geneva; ICRC.

Some discussion of the ICRC is also appropriate in discussing the sources of IHL, given the organisation's unique mandate to develop IHL.<sup>34</sup> The organisation's responsibility for the maintenance of the overall integrity of IHL means that it typically occupies a defensive and uncritical role of IHL as currently codified.<sup>35</sup> This manifests in a tendency towards a defence of the status quo and conservatism in respect of IHL interpretation.<sup>36</sup> One example of this conservatism is in the ICRC's

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34 See further *infra*, text commencing at n 308.

35 According to the Statutes of the Movement, the ICRC has a status of its own (*sui generis*), Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29th International Conference of the Red Cross. As a private association under Swiss law, the ICRC is not an intergovernmental organization. However, in contrast to non-governmental organizations, the ICRC's recognized international legal personality enables it to sign headquarters agreements with States to provide its personnel, premises and correspondence with diplomatic protection. See further Sandoz, Y. (1996). The International Committee of the Red Cross as Guardian of International Humanitarian Law. *Yugoslav Review of International Law* reproduced at <https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm>.

36 'A careful look at these texts, however, shows that they remain valid on the whole and that the difficulties encountered nowadays arise chiefly from the fact that the means and the will to implement them are lacking. The problem is therefore more political than legal.' Ibid, 2. David Forsythe sets forth the criticism as follows: 'The



major study on the protection of women during armed conflict, *Women Facing War*, which found that current treaty-based protections are sufficient, though improved compliance is necessary.<sup>37</sup> This is a conclusion widely disputed by feminist scholars.<sup>38</sup> A further example is the fate of proposals from women's rights advocates for more creative interpretation of the Geneva Conventions and Additional Protocols to respond to more modern understanding of the adverse impact of conflict on women's lives.

The ICRC is explicit that its role is not the transformation of gender social relations, rather its 'policies and programmes are directed towards meeting the needs of

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more critical view sees the ICRC as ultra-slow to change, still controlled at the top by excessively cautious traditionalists who are much affected by Swiss society and political culture, including some of its negative manifestations – like being risk-averse, unilateralist and slow to recognize gender and racial equality.' Forsythe, D. (2007). The ICRC: A Unique Humanitarian Protagonist. *International Review of the Red Cross*, 89(865): 63-96, 64.

37 International Committee of the Red Cross (n 33).

38 For example, Gardam, J. (2005). The Neglected Aspect of Women and Armed Conflict-Progressive Development of the Law. *Netherlands International Law Review*, 197-219; Bennoune, K. (2006). Do we need New International Law to Protect Women in Armed Conflict? *Case Western Reserve Journal of International Law*, 38, 363.

women’.<sup>39</sup> It attributes this position to the specifics of its mandate, namely protection and assistance, and to guard and promote IHL; ‘[t]he ICRC is not mandated to engineer social change with respect to the status of either sex in the cultures in which it works’.<sup>40</sup> Further

as a neutral, impartial and apolitical institution, it is not the role of the ICRC to engage in controversies of an ideological, religious or political nature, such as the debate about gendered power relations. Highlighting social inequalities in terms of rights and resources and pushing to establish a balance in power relations is a political act incompatible with the neutrality principle.<sup>41</sup>

The ICRC has deemed gendered power relations to be a subject of activity incompatible with its core principles. Given the organisation’s unique mandate for IHL development, the prospect of future IHL law-making addressing such matters appears further diminished.

The absence of meaningful prospect for law-making has shaped a relative lack of feminist engagement with IHL.<sup>42</sup> Instead, in much discussion of IHL, in particular by feminists and women’s rights advocates, almost exclusive concern is given to its

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39 International Committee of the Red Cross. (2004). *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*. Geneva: ICRC, 7-8.

40 Ibid.

41 Ibid.

42 As noted by Gardam (n 5).

criminal elements. While Geneva Law does require states to pursue domestic prosecutions for the serious violations of IHL,<sup>43</sup> the thrust and focus of IHL is its protective and non-criminal focus. IHL is intended to limit the belligerent activities of state and non-state armed groups, largely on a basis – not of criminal sanction – but of reciprocity between warring factions. Commentators such as Judith Gardam argue that feminist engagement with IHL has been unhelpfully and unproductively focused on the crime element of the canon, at the expense of a more developed focus on advancing its protection purpose and mandate, which offers the potential of

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43 The ‘grave breaches’ provisions of the four Geneva Conventions and Protocol 1 identify the rules whose violations States are under a duty to prosecute or extradite, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, article 50; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, article 51; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, article 130; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, article 147; Protocol 1 (n 11), article 85. The 1998 Statute of the International Criminal Court is the most recent codification of violations of IHL for which there is international criminal responsibility, Statute of the International Criminal Court (Rome Statute), 17 July 1998, 2187 UNTS 3.

preventing violations against women.<sup>44</sup> In contrast to IHL, however, ICL has offered the scope for very significant feminist input and influence on foundational sources.

### *International Criminal Law*

The origins of ICL are typically located in the post-World War II prosecutions of axis powers in Nuremberg and Tokyo. However, contemporary ICL occupies a much more disparate space. Its implementation and evolution occurs across ad hoc tribunals established by the UNSC, so-called ‘hybrid’ tribunals involving both international and domestic jurisdiction,<sup>45</sup> the International Criminal Court, and in domestic criminal courts giving effect to ICL. As such, while the origins of ICL is linked to the statutes of the Nuremberg<sup>46</sup> and Tokyo<sup>47</sup> tribunals and the later statutes of the ad hoc tribunals for Rwanda<sup>48</sup> and the former Yugoslavia,<sup>49</sup> the contemporary statement of ICL is

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44 Ibid.

45 Statute of the Special Tribunal for Lebanon (STL Statute), 30 May 2007, UNSC Resolution 1757 (2007); Statute of the Special Court for Sierra Leone (SCSL Statute), 16 January 2002, UNSC Resolution 246 (2002).

46 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279.

47 International Military Tribunal for the Far East Charter (IMTFE Charter), January 19, 1946.

48 Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, UNSC Resolution 955 (1994) [hereafter ICTR Statute].

contained in the Rome Statute of the International Criminal Court, and will continue to evolve through judicial development at national, hybrid and international levels.<sup>50</sup>

ICL has been the site of prolific feminist engagement in international law-making. ICL provides, uniquely, for the prosecution of individual perpetrators for ‘international crimes’, defined as war crimes, crimes against humanity, genocide and aggression. In contrast to the static treaty development of IHL since the adoption of the Additional Protocols I and II in 1977, ICL has been a highly dynamic area of law-making since 1990. It is its dynamism that has attracted so much feminist engagement. The opportunity to influence foundational texts (and landmark jurisprudence, as a subsidiary source of international law)<sup>51</sup> offers considerable appeal to advocates.

Because of its role in prosecuting war crimes, ICL is usefully conceived as the enforcement element of IHL. The interaction between IHL and ICL meant that legal developments in ICL have offered the promise of ameliorating some of the most egregious gendered deficiencies of IHL. The Statutes of the ad hoc tribunals for Rwanda and the Former Yugoslavia use a more expansive meaning of IHL, in that they include crimes against humanity and genocide. Further, these tribunals undertake

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49 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), 25 May 1993, UNSC Resolution 827.

50 Rome Statute (n 43).

51 Statute of the International Court of Justice (n 14).

a significant law-making role,<sup>52</sup> albeit of a very different nature to treaty and custom. This law-making role has addressed virtually every aspect of IHL's categories and definitions.<sup>53</sup> Thus, following the establishment of the ad hoc tribunals, considerable transnational feminist organising set out to influence the tribunal interpretations of their mandates, in particular in terms of sexual and gender-based crimes. Landmark successes in this regard were judicial decisions recognising rape as a 'grave breach' of the Geneva Conventions,<sup>54</sup> and constitutive of crimes against humanity<sup>55</sup> and genocide.<sup>56</sup>

The Rome Statute of 1998 is often identified as the high watermark of feminist influence in international law-making.<sup>57</sup> The International Criminal Court is,

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52 See further Darcy, S. (2014). *Judges, Law and War: The Judicial Development of International Humanitarian Law*. Cambridge and New York: Cambridge University Press.

53 Ibid.

54 *Prosecutor v. Tadić*, ICTY, No. IT-94-1-T, 7 May 1997.

55 ICTY Statute (n 49), article 5(g); ICTR Statute (n 48), article 8; SCSL Statute (n 45), article 2(g).

56 *Prosecutor v. Akayesu*, ICTR, No. ICTR-96-4-T, 2 September 1998.

57 Bedont, B. and K. Hall Martinez (1999). 'Ending Impunity for Gender Crimes under the International Criminal Court.' *The Brown Journal of World Affairs*, 6(1): 65-85. Oosterveld, V. (2014). Constructive Ambiguity and the Meaning of 'Gender' for the International Criminal Court. *International Feminist Journal of Politics*, 16(4), 563-580.

uniquely, the permanent international court established to prosecute international crimes in situations in which the relevant state party is 'unwilling or unable'<sup>58</sup> to pursue domestic prosecutions. Highly successful advocacy targeted the negotiation of the Rome Statute, which achieved codification in treaty of jurisprudential developments at the ad hoc tribunals, supplemented by several other measures, such as the recognition of gender as the potential basis of persecution<sup>59</sup> and improved provision for gender representation at the Court.<sup>60</sup> The International Law Commission's draft treaty text contained no references to gender,<sup>61</sup> yet the ultimate treaty text contained nine separate such references. This is a powerful indicator of the success of feminist advocacy in the negotiation of the treaty.

International law not only allows states to prosecute international crimes, but also encourages, and even obligates them under certain circumstances, to do so.<sup>62</sup> This will happen either through the domestic application of ICL (for example, domestic legislation giving effect to the Rome Statute), or more commonly, by applying domestic law. The prosecuting states may exercise jurisdiction according to

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58 Rome Statute (n 43), article 17.

59 Ibid, article 7(1)(h).

60 Ibid, article 36(8)(a).

61 International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission to the General Assembly, 51 UN GAOR Supp. (No. 10) at 88, UN Doc. A/51/10 (1996).

62 Rome Statute (n 43), Preamble: 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.

territoriality or nationality, but they may also legitimately claim universal jurisdiction over crimes committed outside their territory by and against foreigners.<sup>63</sup> The potential enforcement of ICL through international, hybrid and domestic courts posit a broad range of potential international and domestic sources of law. Moreover, the ‘complementary’ jurisdiction of the ICC can only be established in the event that a state party is ‘unwilling or unable’ to pursue domestic prosecutions for international crimes. Thus domestic criminal law remains an enduring source and factor in the operation of ICL.

It is acknowledged that, in comparison to the ad hoc tribunals, the ICC’s role as law-maker is likely to be more circumscribed, not least given the accession to its jurisdiction to date of 124 state parties. Given the importance of judicial activism in enumerating gender crimes through the ad hoc tribunals, the likely diminished significance of judicial decisions going forward may have important gender implications. In contrast to the more limited application of the judgments of the ad hoc international tribunals for Rwanda and Yugoslavia to the small number of directly affected states, the jurisprudence of the ICC has a more general quality. As such, states are more cautious in empowering the institutions and its agents. For example, certain institutional factors limit the scope for judicial activism at the ICC, such as article 61(11) which precludes the addition of new charges after the commencement

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63 See further International Committee of the Red Cross Advisory Service on International Humanitarian Law, ‘Universal Jurisdiction over War Crimes’, available at <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>.



of the trial.<sup>64</sup> This provision is much more restrictive than what existed at the ad hoc tribunals. Whereas the tribunal judges had the right to amend charges during the trial, the designers of the Rome Statute provided the more limited option of recharacterizing the charges.<sup>65</sup> These formal rules are reinforced by so-called ‘informal gender rules’,<sup>66</sup> for example in the assumptions of prosecutors, relying on often inappropriate methods for the investigation of sexual and gender-based crimes, that such crimes are necessarily harder to investigate and prove in court, ‘a view judges have encouraged and reinforced’.<sup>67</sup>

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64 Rome Statute (n 43), article 61(1).

65 Regulation 55 permits the Court to re-characterise the facts in order to accord with crimes under articles 6, 7 and 8 of the Rome Statute, International Criminal Court Regulations, ICC-01/04-01/06-1891-tENG. See further *infra* Chapter 5 and Schabas, William A. 2017. *An Introduction to the International Criminal Court*. 4th ed. Cambridge, UK: Cambridge University Press, 308.

66 See further Mackay, F., Kenny, M., & Chappell, L. (2010). New Institutionalism through a Gender Lens: Towards a Feminist Institutionalism? *International Political Science Review*, 31, 573.

67 Chappell, L. *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*. Oxford: Oxford University Press, iii; Chappell, L., R. Grey and E. Waller (2013). ‘The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia.’ *International Journal of Transitional Justice* 7: 455-475.

The sources of ICL have, therefore, been relatively open to feminist influence and progressive codification. Nevertheless, considerable concern persists – is arguably growing, in fact – concerning the efficacy of such feminist interventions. In practical terms, concerns arise from the very small number of victims reached through prosecutions, but also more broadly due ICL’s focus on punishment over protection, as well as the essential reliance on flawed institutions to operationalize ostensibly progressive treaty measures.

### *International Human Rights Law*

Uniquely in international law terms, women’s rights are given a specialist treaty basis in IHRL by the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). For a long time, the ‘specialist’ nature of women’s rights constituted a ‘women’s ghetto’ in the international human rights system.<sup>68</sup> In institutional terms, the human rights treaties emerge from the human rights role formally attributed to ECOSOC under the UN Charter.<sup>69</sup> ECOSOC gave practical expression to this mandate by quickly establishing both a Commission on Human

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68 Charlesworth, H. (1994). What are ‘women's international human rights’? In R. J. Cook (Ed.), *Human Rights of Women: National and International Perspectives*. Philadelphia: University of Pennsylvania Press, 60.

69 Charter of the United Nations, 24 October 1945. Further, articles 55 and 56 pledge member states to take cooperative action to promote universal respect and observance of human rights.

Rights and a Commission on the Status of Women.<sup>70</sup> Initial drafts of the human rights treaties emerged from these bodies, further scrutinized by the relevant Committees of the General Assembly and ultimately adopted by the General Assembly. The ‘specialist’ nature of women’s human rights took institutional expression in the distinct operation of the Commission on the Status of Women from the Commission on Human Rights, and the specialist treaty basis of CEDAW and its monitoring committee. This tension between ‘mainstream’ and ‘specialist’ protection of the human rights of women presents enduring dilemmas for women’s rights advocates seeking enhanced protection for women’s rights in conflict under IHRL.

The foundational source of IHRL is the 1948 Universal Declaration of Human Rights. Intended as a political consensus document, the Declaration was translated into a formal set of treaty obligations with the adoption of the International Covenant on Civil and Political Rights<sup>71</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>72</sup> There are, at the time of writing, nine broad themes of international human rights treaties, which are informally divided into the ‘mainstream’ treaties for universal application principally – though not exclusively – dedicated to the

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70 Economic and Social Council (ECOSOC) resolution establishing the Commission on Human Rights and the Subcommission on the Status of Women, 21 June 1946, ECOSOC Res 11, UN Doc E/RES/2/11.

71 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171.

72 International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3.

protection of civil and political rights,<sup>73</sup> and ‘specialist’ treaties for the protection of certain sub-groups of rights-holders, specifically women, children, people with disabilities and migrant workers.<sup>74</sup> The so-called ‘specialist’ treaties can be seen broadly as a response to identified shortcomings and solipsism of the ‘mainstream’ system. More specifically, the adoption of CEDAW can reasonably be seen as an acknowledgment of the gendered gaps of the so-called ‘mainstream’ human rights treaties adopted hitherto. (Indeed, this is expressly acknowledged in the Preamble to CEDAW.<sup>75</sup>)

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73 ICCPR (n 71); ICESCR (n 72); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; and the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3.

74 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, 1249 UNTS 13; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195; Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3; Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3; and the International Convention for the Protection of All Migrant Workers and their Families, 18 December 1990, 2220 UNTS 3.

75 ‘Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights... Concerned, however, that

Treaties are the paradigmatic source of international law. The existence of multiple multilateral human rights treaties – without any clear hierarchy between treaties and involving different subgroups of state parties – is part of the essential pluralism of IHRL and indeed international law more broadly. Likewise, the different human rights treaty monitoring bodies operate autonomously and without any clear hierarchy, interpreting many of the same principles through their state party monitoring, development of general comments and recommendations, and decisions in communications. Further, the treaty-monitoring bodies borrow approaches and interpretations eclectically across one another. Thus, precedents are adopted and developed in a very ad hoc and non-linear manner. While the ‘mainstream’ instruments are very widely – almost universally – ratified, the specialist instruments enjoy much more varying levels of ratification. CEDAW and the Convention on the Rights of the Child, for example, have 189 and 196 state parties, respectively; the Migrant Workers Convention has just 51 state parties. In addition to these nine rights-affirming treaties, which establish independent treaty monitoring bodies, are nine further treaties establishing enforcement procedures, such as individual communications or inquiry procedures, to the mainstream and specialist treaties.<sup>76</sup>

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despite these various instruments extensive discrimination against women continues to exist,’ CEDAW (n 74), Preamble.

<sup>76</sup> Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989, 1642 UNTS 414; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, 2131

These enforcement procedure treaties are less widely ratified than the treaties to which they relate. A final category of human rights treaty is the regional human rights treaty, such as the European<sup>77</sup> and American<sup>78</sup> Conventions on Human Rights and the African Charter on Human and Peoples' Rights.<sup>79</sup> While the treaty obligations and the jurisprudence emerging from regional human rights courts are binding only on parties to respective treaties, in practice the regional systems borrow across one another. This cross-regional borrowing can be significant for the protection of women's rights, such as the Inter-American court's doctrine of 'due diligence' obligation on states to

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UNTS 83; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, 2173 UNTS 222; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, 2171 UNTS 227; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, 2375 UNTS 237; Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, 2518 UNTS 283; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, 2922 UNTS Reg No 14531; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 19 December 2011, 2983 UNTS Reg No 27531.

<sup>77</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

<sup>78</sup> American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

<sup>79</sup> African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

prohibit, prevent and punish violations perpetrated by private actors.<sup>80</sup> While this tapestry of treaty commitments and enforcement procedures are referred to collectively as the international system for the protection of human rights, the extent to which this network of treaty commitments constitutes a ‘system’ is in fact debateable.

Understanding the sources of IHRL is further complicated by the widespread practice by states of entering reservations to human rights treaties. While they are an issue across human rights treaties, CEDAW bears the unfortunate distinction of being the human rights treaty subject to the largest number of reservations by ratifying states.<sup>81</sup> According to Charlesworth and Chinkin, ‘some states have used the reservation mechanism effectively to hollow out the heart of their formal obligations’.<sup>82</sup> These widespread reservations likewise erode the capacity of the treaty monitoring body to effectively monitor and enforce the Convention’s protections of women’s rights in conflict against all state parties. A further concern in terms of the sources of IHRL is the ‘soft law’ status of much of the most progressive articulations of women’s rights,

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80 See further Londoño, P. (2009). Developing Human Rights Principles in Cases of Gender-based Violence: *Opuz v Turkey* in the European Court of Human Rights. *Human Rights Law Review*, 9(4), 657-667.

81 See generally Cook, R. (1990). Reservations to the Convention on the Elimination of All Forms of Discrimination of Women. *Virginia Journal of International Law*, 30, 643-716.

82 Charlesworth, H., & Chinkin, C. (2000). *The Boundaries of International Law: A Feminist Analysis*. Manchester: Manchester University Press, 113.

both in conflict and beyond. Soft law instruments such as general comments and recommendations form an important treaty interpretative function for generally worded human rights treaties. They have been very important for advancing feminist articulations of women's human rights.

In the case of the CEDAW Committee, developing soft law is a unique and critical activity in advancing feminist-informed interpretations of CEDAW provisions and, ultimately, in shaping normative development of IHRL. The Committee undertakes this work in particular by articulating authoritative interpretations of the Convention through its General Recommendations. The Convention guarantees broad rights of non-discrimination against women and the Committee plays a key role in developing and interpreting the application of those broad rights to specific settings and challenges. Under the CEDAW's article 21, the General Recommendations are informed by the Committee's state monitoring activities and focus on cross-cutting systematic or structural issues that are best dealt with by a more general statement to all state parties. They are to be distinguished from the narrower recommendations tailored to specific state parties that are made in Concluding Observations. Yet, they have only persuasive status under international law. As such, they are not formally considered sources of international law and face resistance to their strict application by some state parties.<sup>83</sup>

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83 See, for example, objections expressed by Egypt in the 2016 Arria Formula Meeting between the UNSC and CEDAW, see further 'Pursuing Synergies to Guarantee Women's Rights in Conflict: The UNSC Arria Formula Meeting on CEDAW and the Women, Peace and Security Resolutions', February 8, 2017, available at <https://ilg2.org/2017/02/08/pursuing-synergies-to-guarantee-womens->



Human rights soft law does not emerge only from the treaty bodies. The so-called ‘Charter-based’ bodies, which draw their legal basis from the human rights provisions of the UN Charter<sup>84</sup> and the Universal Declaration of Human Rights,<sup>85</sup> likewise generate human rights soft law. Most prolifically, the Human Rights Council (formerly the Commission on Human Rights) adopts resolutions that make recommendations to the General Assembly for the progressive development of human rights law.<sup>86</sup> Although not formally binding, as an intergovernmental body with relatively broad membership,<sup>87</sup> Human Rights Council resolutions indicate consensus amongst states on the substance of human rights norms. They can, in turn, inform General Assembly resolutions on human rights themes, such as the Basic Principles on the Right to a Remedy and Reparations<sup>88</sup> and the Declaration on the Elimination of Violence Against Women.<sup>89</sup>

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[rights-in-conflict-the-un-security-council-arria-formula-meeting-on-cedaw-and-the-women-peace-and-security-resolutions/](#).

84 UN Charter (n 69), article 1(3).

85 Universal Declaration of Human Rights, UNGA Resolution 217 A(III) of 10 December 1948.

86 UNGA Resolution 60/251 (2006), paragraph 5(c).

87 Ibid, paragraph 7, providing for the Council to consist of 47 UN member states, based on equitable geographical distribution and elected on a rotating basis.

88 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

On occasion, women's civil society has endeavoured to develop guidelines and recommendations on particular subjects of human rights. Two examples are the Montréal Principles on Women's Economic, Social and Cultural Rights<sup>90</sup> and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.<sup>91</sup> The Montréal Principles sought to assist in 'understanding and determining violations of economic, social and cultural rights and in providing remedies thereto' by adding a gender dimension. The Nairobi Declaration addressed the silence on gender of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>92</sup> As instruments produced by civil society, these efforts fall outside the formal sources of international (and hence human rights) law as set out in the Statute of the ICJ, Article 38(1). They do not carry even in the 'indirect' legal effect of soft law. Rather, they are prepared in the hope that they will be adopted

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Violations of International Humanitarian Law, adopted and proclaimed by UN General Assembly Resolution 60/147, 16 December 2005.

89 Declaration on the Elimination of Violence Against Women, UN General Assembly, 20 December 1993, UN Doc. A/RES/48/104.

90 Montréal Principles on Women's Economic, Social and Cultural Rights, *Human Rights Quarterly*, 26, 760–780 (2004).

91 See further Couillard, V. (2007). The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence. *International Journal of Transitional Justice*, 1, 444-453.

92 Ibid.

by other international actors, cited and applied by decision and policy-makers and thus come to be accepted as contributing to the corpus of international law. Their influence will depend in each instance on such factors as the quality of the text, the standing of the authors and the degree of acceptance.<sup>93</sup>

IHRL draws from diverse treaty sources. Combined with a diffuse system of treaty interpretation and norm development, this opens considerable space for the creative and resourceful advocate to advance expansive and progressive articulations of women's rights in conflict. Likewise, it can also make ostensible progress on women's rights within one treaty system or body more difficult to consolidate across IHRL.<sup>94</sup> Such is the essential pluralism of IHRL.

#### *United Nations Security Council*

The UNSC operates on the basis of a universally ratified treaty, namely the United Nations Charter of 1945.<sup>95</sup> The UNSC has the responsibility to weigh the evidence in

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93 Account taken from Freeman, M. A., Chinkin, C., & Rudolf, B. (2012). *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford and New York: Oxford University Press, 24.

94 Consider the diverse approaches in access to abortion under the different treaty monitoring bodies, see further Zampas, C., & Gher, J. M. (2008). Abortion as a Human Right - International and Regional Standards. *Human Rights Law Review*, 8(2), 249-294.

95 UN Charter (n 69), Chapter V.

individual circumstances and to identify threats to the peace, breaches of the peace, and acts of aggression.<sup>96</sup> In determining the appropriate response to situations on its agenda, the UNSC can choose between its recommendatory powers under Chapter VI for the ‘Pacific Settlement of Disputes’<sup>97</sup> or its binding powers under Chapter VII for ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’.<sup>98</sup> Envisaged as the enforcement body of the United Nations, the UNSC has unique authority to make binding decisions<sup>99</sup> and extraordinary powers that include the authorisation of the use of force.<sup>100</sup> Those extraordinary powers reflect the primary mandate of the organ, namely ‘the maintenance of international peace and security’.<sup>101</sup>

While the UN Charter mandates UN member states to ‘accept and carry out’ decisions of the UNSC,<sup>102</sup> it is decisions adopted under Chapter VII of the UN Charter

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96 Ibid, article 39.

97 Zampas, C., & Gher, J. M. (2008). Abortion as a Human Right - International and Regional Standards. *Human Rights Law Review*, 8(2), 249-294.

98 See generally UN Charter (n 69), Chapter VI, Pacific Settlement of Disputes.

99 UN Charter (n 69), article 25.

100 Ibid.

101 Ibid, article 24(1).

102 Ibid, article 25

(International Peace and Security) that are binding in nature.<sup>103</sup> On this basis, the UNSC can regulate state behaviour worldwide and for extended periods.<sup>104</sup> Thus, in cases such as Iraq, former Yugoslavia, Sierra Leone, embargoes on certain products, services and action were in force over years, binding the behavior of *all* states, not just targeted states. But although this constitutes legislation in form, it is, in principle, confined to specific situations and preliminary effects;<sup>105</sup> it ends when the threat to the peace that has given rise to the measure disappears. Thus, such law creation might, in substance, be regarded as analogous to executive regulations rather than to true legislation.<sup>106</sup> Being primarily endowed with a police function, the UNSC is, in principle, not in a position to create general legal rules directly. Any law-making that reaches further than the concrete case can only be reached in an indirect way.<sup>107</sup> UNSC resolutions might provide indication of existing state practice or form a starting point for future developments, but unlike General Assembly resolutions, action by the UNSC is immediately supported only by its fifteen members and

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103 See, for example, ‘Extending the Mandate of the UN Operation in Iraq: Options’, available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg43716/pdf/CHRG-110hhrg43716.pdf>.

104 Simma, B., Mosler, H., Paulus, A., & Chaitidou, E. (2002). *The Charter of the United Nations: a commentary* (2nd ed.). Oxford: Oxford University Press. 708

105 Ibid, 708.

106 Ibid, 709.

107 Ibid.

therefore cannot claim to represent the view of the whole international community.<sup>108</sup>

In order to produce new law, additional elements of state practice are necessary.

Despite being quite clear in the Charter, the evidence of the UNSC nevertheless assuming legislative and quasi-legislative authority is manifest. Interestingly, the issue of women's rights in conflict has been prominent in such activity. The UNSC has been the site of some of the most significant recent developments regarding women's rights in armed conflict under international law. To illustrate, the UNSC made a first ambitious step towards embedding women's rights in conflict within its agenda by the adoption of resolution 1325 on WPS in October 2000.<sup>109</sup> Seven additional WPS resolutions have since been adopted. Three focus broadly on advancing the women's participation pillars<sup>110</sup> and four focus on sexual violence in armed conflict.<sup>111</sup> These UNSC attempts to set, though in a non-binding manner, standards for certain areas such as WPS indicate its adoption of a quasi-legislative function.

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108 Ibid.

109 UNSC Resolution 1325 (2000).

110 UNSC Resolution 1889 (2009); UNSC Resolution 2122 (2013); UNSC Resolution 2242 (2015).

111 UNSC Resolution 1820 (2008); UNSC Resolution 1888 (2009); UNSC Resolution 1960 (2010); UNSC Resolution 2106 (2013).

The legal status of so-called ‘thematic’ resolution, such as WPS – and indeed the ‘law-making’ capacity of the UNSC – has been the subject of heavy contestation.<sup>112</sup> Such thematic activity commenced with ostensibly humanitarian and ‘human security’ focused concerns, namely the protection of civilians, women and children in armed conflict.<sup>113</sup> In its response to the terrorist attacks on the United States of September 11, 2001, however, the Council has proceeded to legislate for counter-terrorism in a far more direct way: it has created obligations for States to take action against terrorism in general and has enacted many of the provisions contained in earlier conventions against terrorism under Chapter VII, without confining itself to the concrete case.<sup>114</sup> Although the Council action has been unanimous, without the objection of any state, it remains difficult to justify under the UN Charter. If, however, states continue to endorse the exercise of true legislative functions by the Council, the original Charter conception might undergo significant change, as it has already done in other areas.<sup>115</sup> There has not been a clear feminist position *per se* on the question of the UNSC’s law-making capacity.

There are several reasons to be concerned about the UNSC’s development of legislative and quasi-legislative functions, based on accountability, participation,

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112 Szasz, P. C. (2002). The Security Council Starts Legislating. *American Journal of International Law*, 96(4), 901-905.

113 Simma et al (n 104), 709

114 UNSC Resolution 1373, 2001). See further *ibid*.

115 Simma et al (n 104), 709.

procedural fairness and transparency of decision-making.<sup>116</sup> Boyle and Chinkin note that the UNSC is not a representative body and, as a result, its legislative action can lack legitimacy and acceptability to non-members.<sup>117</sup> Procedurally, its negotiations are in private, involving UNSC member states only.<sup>118</sup> The power that this gives the UNSC, in particular the permanent members, violates the principle of sovereign equality of states and the principal that states must consent to new obligations under international law.<sup>119</sup> There is no real scope for challenging or judicially reviewing the UNSC's decisions.<sup>120</sup> Further, permanent members of the UNSC can veto any resolution that affects its interests or those of its allies, resulting in grave inconsistency in the operation of the Council. These concerns and flaws in UNSC law-making are particularly worrying to states in the global south, whose interests are represented in the Council by only a handful of non-permanent members:

The Security Council is a seriously deficient vehicle for the exercise of legislative competence. Dominated by the permanent members, or sometimes by only one or two of them, unrepresentative and undemocratic, its quasi-

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116 Boyle, A., & Chinkin, C. (2007). *The Making of International Law*. Oxford & NY: Oxford University Press. 114-115, 229-232.

117 Ibid, 114.

118 Ibid.

119 Ibid.

120 Ibid. Efforts by some smaller states to include a provision in the Charter to permit ICJ review of SC decisions affecting the essential rights of states was rejected. Simma et al (n 104), 703.



legislative powers can only be justified by reference to the paramount urgency and importance of its responsibility for the maintenance of international peace and security.<sup>121</sup>

Importantly, Boyle and Chinkin note, ‘the increasing prominence of the UNSC in the dynamics of international law-making marks an important shift of power and influence away from the General Assembly’.<sup>122</sup>

These ostensibly quite formalistic questions regarding the sources of international law and the appropriateness of the UNSC’s law-making on women’s rights in conflict have been the subject of relatively little feminist analysis.<sup>123</sup> Rather, feminist engagement has tended to focus on implementation problems of the WPS agenda,<sup>124</sup> as well as more abstract theoretical critique of representations of gender through the

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121 Ibid, 115.

122 Ibid.

123 But see O’Rourke, C. (2017). Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions. *European Journal of International Law*, 28(4), 1019–1045; Otto, D. (2009). The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade. *Melbourne Journal of International Law*, 10, 11.

124 See, for example, the United Nations. (2015). Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325. New York.

WPS resolutions.<sup>125</sup> More considered reflection on the sources of law for the UNSC activities, it is submitted, might usefully inform productive engagement with UNSC's Charter-based powers of authorising peacekeeping and peace enforcement missions, country-specific resolutions, sanctions and referrals to the ICC. It might, likewise, move feminists away from advocating (implicitly at least) a formal law-making rule for a UN organ with such unrepresentative, even problematic, composition.

### **Definitions of Conflict and Women's Rights**

Contrasting legal definitions of conflict with women's lived experience is a core entry-point of feminist engagement and analysis of international law. Observations such as 'there is no aftermath for women'<sup>126</sup> point to the inadequacies of international law in defining and reflecting conflict experience in ways that align with the diverse experiences of women. Much feminist critique focuses on the inadequacy of the legal definition of conflict in capturing women's experiences of, for example, the continuities between pre-, during and post-conflict violence.<sup>127</sup> However, even under international law, the definition of 'conflict' is not the subject of legal consensus. Under IHL, ICL, IHRL and the UNSC, varying definitions and thresholds apply. The

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125 For example Shepherd, L. (2017). *Gender, UN Peacebuilding and the Politics of Space*. Oxford and New York: Oxford University Press.

126 Meintjes, S., Pillay, A., & Turshen, M. (Eds.). (2001). *The Aftermath: Women in Post-Conflict Transformation*. London & NY: Zed Books.

127 Swaine, A. (2018) *Conflict-related Violence Against Women: Transforming Transitions*. Cambridge and New York: Cambridge University Press.

more technical definition of IHL contrasts with the broad and flexible definition offered, for example, by the CEDAW Committee. The UNSC offers an even more limited definition, confined to ‘threats to international peace and security’.<sup>128</sup> Moreover, no definition of conflict is clearly more, or less, ‘women-friendly’. Rather the significance of the conflict definition is that it determines which regime or regimes apply to specific conflict-settings, which in turn determines the underpinning definition of women’s rights, the monitoring body and enforcement procedure involved, and the opportunities for women’s participation.

In their underpinning definitions of women’s rights, the regimes differ importantly between the protection and prevention emphasis of IHL, the punishment and anti-impunity emphasis of ICL, the women’s rights and equality emphasis of IHRL and the collective security focus of the UNSC. The section elucidates these differences, as well as discussing the varying definitions of sexual violence in armed conflict that underpins each regime.

The term ‘conflict-related sexual violence’ is increasingly popular in scholarship<sup>129</sup> and policy-making.<sup>130</sup> One broad definition of conflict-related sexual violence that is commonly utilised comes from the United Nations Secretary-General as ‘sexual

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128 UN Charter (n 69), Chapter VII.

129 See especially Swaine (n 127).

130 See, for example, UN Women. (2010). *Addressing Conflict-related Sexual Violence: An Analytical Inventory of Peacekeeping Practice*. New York; UN Department of Political Affairs. (2012). *Guidance for Mediators: Addressing Conflict-related Sexual Violence in Ceasefire and Peace Agreements*. New York.

violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself".<sup>131</sup> Conflict-related sexual violence includes manifestations of violence that may reach the tactic of war threshold<sup>132</sup> as well as sexual violence against civilians within the wider context of the conflict. Conflict-related sexual violence can be individual and collective, and the harms that ensue are physical, moral, emotional, social, immediate, and intergenerational.<sup>133</sup> Acts falling within the definition of conflict-related sexual violence include rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual

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131 UN Secretary-General. (2010). Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), U.N. Doc. A/65/592-S/2010/604, paragraph 5.

132 Eriksson Baaz, M. and Stern, M. (2013). *Sexual Violence as A Weapon of War? Perceptions, Prescriptions, Problems in The Congo And Beyond*. London: Zed Books, 45–46.

133 See Rubio-Marin, R. (2012). Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue. *Wm. & Mary J. Women & L* 19, 69 - 104, 74–76; See also United Nations Secretary-General. (2012). Report of the Secretary-General on Conflict-related sexual violence. Security Council. UN Doc. A/66/657–S/2012/33 (discussing implementation of United Nations initiatives and providing information on continuing violations); U.N. Department of Economic and Social Affairs Division for the Advancement of Women. (1998). Sexual Violence and Armed Conflict: United Nations Response. *Women2000*, archived at <http://perma.cc/ZD6U-C9BA>.

enslavement, and forced nudity.<sup>134</sup> This broad definition, however, is not strictly legal. It does not align with the regimes under scrutiny. As the section elucidates, the regimes differ in the acts that constitute sexual violence and in how the relationship to conflict is determined.

Ultimately, the book utilizes the language of women's rights in conflict not to pretend some reconciled consensus around core concepts, but to illustrate key sites of divergence between the regimes. These lines of divergence are explored more fully in this section.

### *International Humanitarian Law*

Stagnant treaty-development is not the only grounds for broad feminist disengagement with IHL. In addition, IHL is built on very involved definitions and categories of conflict that struggle to capture either women's experiences or the most common contemporary manifestations of conflict.

Uniquely of the four regimes, the presence of armed conflict is required in order to apply most of the corpus of IHL. Consequently, the question of conflict thresholds is most assiduously addressed under IHL. An authoritative definition of armed conflict was provided by the ICTY Appeals Chamber in the landmark 1995 Interlocutory Appeal Decision on Jurisdiction in *Prosecutor v Tadić*: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such

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134 UN Action Against Sexual Violence in Conflict. (2011). Analytical & Conceptual Framing of Conflict-Related Sexual Violence 1, archived at <http://perma.cc/D97Z-YJDC>.

groups within a State'.<sup>135</sup> Parties to conflict are bound by the interrelated core principles of customary IHL that are relevant to the conduct of any armed conflict, namely the obligation of distinguish between civilians and combatants and target only the latter. While civilians cannot be targeted, all harm to civilians is not prohibited. Rather such harm must accord with principles of proportionality<sup>136</sup> and precaution in attack.<sup>137</sup> In addition, methods and means of combat should not cause 'unnecessary suffering'.<sup>138</sup>

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135 *Prosecutor v. Tadić*, Case No. IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 70.

136 A party is required to forego any offensive where the incidental damage expected 'is excessive in relation to the concrete and direct military advantage anticipated'. See International Committee of Red Cross, *Customary IHL Database*, Rule 14, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14).

137 Prior to any attack, all feasible precautions must be taken to ensure that the subject of the attack are legitimate military objectives, and to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Where a civilian population is reasonably expected to be affected by the attack, 'effective advance warning' must be given to the civilian population unless the prevailing circumstances do not allow such a warning. Further, parties must take 'all feasible precautions' to protect those civilian populations under their control from the effects of an attack by the opponent. Each party must avoid locating objects that could be considered 'legitimate military objectives' in populated areas. Similarly, the use of human shields

Further, there are three broad categories of conflict that are differently regulated under IHL, namely international armed conflict between states, non-international armed conflicts within states, and occupation, when a State exercises an unconsented-to effective control over a territory on which it has no sovereign title. A fourth category of relevance is ‘internal disturbance’ when fighting does not meet the threshold of non-international armed conflict. Most IHL deals with international armed conflict, that is, those between states, even though most contemporary armed conflicts happen within states.<sup>139</sup> The limited treaty basis to address non-international armed conflict under the 1949 Geneva Conventions is reflected in Common Article 3 of the four Geneva Conventions, which articulates humanitarian principles applicable to ‘armed

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to protect certain objects or individuals is prohibited. International Committee of Red Cross, *Customary International Humanitarian Law*, rule 97, which is derived in part from the IHRL obligation upon states to protect life.

138 This principle of ‘humanity’ stipulates that civilians and those who are hors de combat must be treated humanely: any killing, torture, rape, mutilation, beatings, humiliation, and similar abuses are prohibited. In addition, methods or means of combat should not cause ‘unnecessary suffering’. The International Court of Justice has defined unnecessary suffering as ‘harm greater than that unavoidable to achieve legitimate military objectives’. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, paragraph 78.

139 *Tadić* (n 135), 489.

conflict not of an international character'.<sup>140</sup> Common Article 3 contains only the most fundamental laws, and is applicable to all parties concerned, including insurgency forces. It stipulates that civilians and combatants hors de combat shall 'be treated humanely', and without discrimination, to preclude *inter alia* torture, outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>141</sup>

With the increased concern about armed conflict that are solely or partly internal, such as civil wars, Additional Protocol II developed and supplemented common Article 3 in respect of armed conflict within a State between its forces and dissident forces or other organised armed groups. But, unlike the rest of the Geneva Conventions, neither Common Article 3 nor Additional Protocol II has enforcement provisions under IHL.<sup>142</sup> Additionally, the threshold of application of Protocol II is so high that it limits the application of the Protocol to 'situations at or near the level of full-scale civil war'.<sup>143</sup> As a result, it is rarely applied in practice. Further, in practice

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140 Article 3(1) common to First Geneva Convention (n 43), Second Geneva Convention (n 43), Third Geneva Convention (n 43) and Fourth Geneva Convention (n 43).

141 Ibid. Henckaerts, J.M. and Doswald-Beck, L. for the International Committee of the Red Cross. (2005). *Customary International Humanitarian Law* (3 vols.) Cambridge: Cambridge University Press.

142 Except, as noted below, ICL removes the international / non-international distinction and its enforcement provisions apply regardless, see *infra* text at n 179-182.

143 Protocol II (15), paragraph 79.



many governments concerned instead characterise many situations of internal violence as ‘internal disturbances’. State authorities indeed have a tendency to deny that an armed conflict is taking place on their territory, in an effort to free themselves from the limitations imposed by IHL. In the absence of an impartial body to authoritatively characterise the conflict, denial of the applicability of IHL is fairly common.<sup>144</sup> Common Article 3, which does not define ‘armed conflicts not of an international character’, leaves a wide margin for governments to contest its applicability.<sup>145</sup>

Gender critique of IHL has principally addressed the failure of the doctrine to articulate how general protections to civilians apply specifically to civilian women, beyond a broad commitment to non-discrimination in their application.<sup>146</sup> IHL addresses itself *inter alia* to several aspects of personal safety, access to food, water and shelter, health, hygiene and sanitation, education and sources of livelihood.<sup>147</sup> It further addresses the situation of women in detention and internment,<sup>148</sup> and women

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144 Jacques, M. (2012). *Armed conflict and displacement: the protection of refugees and displaced persons under international humanitarian law*. Cambridge & NY: Cambridge University Press, 72.

145 United Nations Commission on Human Rights. (1998). Minimum humanitarian standards: analytical report of the Secretary-General. 5 January 1998, UN Doc. E/CN/4/1998/87, paragraph 74.

146 See generally Gardam (n 22).

147 See generally International Committee of the Red Cross (n 33).

148 Ibid, 153-210.

directly involved in hostilities<sup>149</sup> (though these latter provisions are less exacting). To the extent that there is an obligation on actors to observe IHL without discrimination on the basis of gender, women are protected as participants in hostilities, as civilians, and as missing or displaced persons or persons in detention.<sup>150</sup> In this respect, IHL is argued to be more deficient than its parallels in the other regimes under scrutiny, in which more fulsome articulation of the women's gender-specific rights have been articulated.

Further critique focuses on the very particular, and quite problematic, way in which gender-specific protections to women have been articulated under IHL. A number of specialist protections for women are included throughout the Geneva Conventions and Additional Protocols. The four 1949 Geneva Conventions contain some 19 provisions that are specifically relevant to women. The scope of these rules is somewhat limited and many of them are in fact designed to protect children. Overall, the aim of the Conventions is to provide special protection for pregnant women, nursing mothers and mothers in general and to address the vulnerability of women to sexual violence in times of armed conflict. This is a definition of women's rights in conflict that draws legitimate critique for its narrow boundaries.

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149 Ibid, 23-27.

150 See further Lindsay, C. (2000). Women and War – An Overview'. *International Review of the Red Cross*, 839.

To further illustrate, while rape was included within the litany of prohibited acts against civilians,<sup>151</sup> it is not specifically enumerated as a ‘grave breach’ of the Geneva Conventions requiring prosecution. In addition, the offence is articulated as a crime against ‘women’s honour’,<sup>152</sup> as distinct from her bodily integrity or autonomy. Finally, arguably most problematically, this is the limit of gender-specific protections afforded to women under the Geneva Conventions. Against this backdrop, the new focus on ‘the fertile and expectant woman’<sup>153</sup> in the 1977 Additional Protocols offered greater, if still limited, promise. The Conference acknowledged that women because of their ‘special situation’ had to be given ‘special protection’. Such women in a special situation were described as those who ‘were pregnant women, maternity cases and women who were in charge of children of less than seven years of age or who accompanied them’.<sup>154</sup>

Apart from the protection afforded under such articles, which is clearly valuable as far as it goes, any indication that the adverse impact of conflict on women might be

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151 ‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.’ Fourth Geneva Convention (n 43), article 27, paragraph 2, C and Protocol 1 (n 11), articles 75 and 76.

152 Ibid.

153 Ní Aoláin, F. (2000). ‘Sex-based Violence and the Holocaust - A Reevaluation of Harms and Rights in International Law.’ *Yale Journal of Law and Feminism* 12: 43 – 84, 68-69.

154 Quoted in *ibid.*

distinctive and encompass wider issues than their roles as mothers and victims of sexual violence is not discernible in the provisions of the Geneva Conventions. Likewise, in the Additional Protocols, the focus continues to be on protection for pregnant women and mothers. In the context of sexual violence, Article 76 of Protocol I contains the important comprehensive provision specifically protecting women against rape, although this practice is still not designated as a grave breach. There is no recognition, either in the *travaux préparatoires* or in the provisions themselves, of the other distinctive problems women face in armed conflict.<sup>155</sup> On the whole, these gender-specific provisions point to a very circumscribed definition of women's rights in conflict.

It bears reflection, however, that the articulation of women's rights in conflict under IHL is arguably the most comprehensive of the regimes under scrutiny, in that it reaches into many aspects of daily civilian life under conflict and occupation. To illustrate, IHL sets out in some detail the rights and entitlements of various categories of war victims to humanitarian assistance.<sup>156</sup> These rights and entitlements are not unique to expectant and lactating mothers, but they are particularly detailed in this respect. The Fourth Geneva Convention requires High Contracting Parties to permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under the age of fifteen, expectant mothers and maternity

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155 Gardam J, (1998). Women, Human Rights and International Humanitarian law. *International Review of the Red Cross*, 324, 421.

156 See further International Committee of the Red Cross (n 33), 81-82.

cases.<sup>157</sup> Article 89 requires that interned pregnant and nursing mothers be given additional food ‘in proportion to their physiological needs’.<sup>158</sup> Further, Additional Protocol I provides that, in the distribution of relief consignments, priority must be given to children, expectant mothers, maternity cases and nursing mothers.<sup>159</sup> In non-international armed conflicts, the principle of distinction is also applicable and Additional Protocol II reiterates the prohibition on the starvation of the civilian population as a method of warfare.<sup>160</sup> Further, denial of food or of access to food to persons *hors de combat* is a violation of the principle of humane treatment laid down in Common Article 3. In addition, Common Article 3 entitles impartial humanitarian organisations to offer their services to the parties to the conflict, an offer which cannot be arbitrarily declined. Also, the Fourth Geneva Convention and Additional Protocol I lay down a series of provisions dealing with collective and individual relief supplies for civilians in occupied territories.<sup>161</sup>

Nevertheless, the ‘limited and pragmatic’ objectives of IHL, namely ‘to limit suffering during times of armed conflict, not to redress social inequalities or assist in

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157 Fourth Geneva Convention (n 43), article 23.

158 Ibid, article 89.

159 Protocol I (n 11), article 70(1).

160 Protocol II (n 150), article 14.

161 Fourth Geneva Convention (n 43), article 55. The basic rule is that the Occupying Power has the duty to provide food and medical supplies for the population and that it should bring the necessary foodstuffs, medical stores and other articles into the occupied territory if the resources of that territory are inadequate.

rebuilding post-conflict communities’<sup>162</sup> remains a key line of feminist critique of the underpinning definition of women’s rights.<sup>163</sup> This specificity of rights of humanitarian organisations to access civilian populations are illustrative of the detail provided in IHL, involving implicit definitions of women’s rights in conflict that address the right to food, that find no effective parallel under the other regimes of relevance. As has been well-documented, access to food in periods of conflict is fundamentally gendered, because women’s reproductive roles makes them more vulnerable to food shortages. Women of childbearing age typically need more vitamins and minerals, while pregnant and lactating mothers have specific nutritional requirements linked to their own and their children’s survival. Moreover, certain health deficiencies (iron, protein, iodine) all affect women more than men.<sup>164</sup> The focus of scholarly critique on the problematic gender essentialism of IHL has arguably distracted from the potentially more fruitful focus on the specific protections afforded to civilians, including women, and how improved compliance might be achieved.

In terms of the regime’s definition of sexual violence, critics argue that IHL does not prohibit sexual violence in a sufficiently robust manner, leaving the prohibition

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162 Durham, H. (2002). Review of 'Women, Armed Conflict and International Law'. *International Review of the Red Cross*, 84, 655-659, 657.

163 For an effective overview of this debate, see Oosterveld, V. (2009). ‘Feminist Debates on Civilian Women and International Humanitarian Law.’ *Windsor Yearbook of Access to Justice* 27: 385-402.

164 International Committee of the Red Cross (n 33), 77-78.

largely implied, rather than explicit.<sup>165</sup> Broadly speaking, rape is expressly prohibited,<sup>166</sup> while the prohibition of other forms of sexual violence is encompassed in less explicit provisions such as the prohibitions against cruel treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution, and those intended to ensure respect for persons and honour.<sup>167</sup> In contemporary IHL treaties, rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts. In international armed conflicts, the Third Geneva Convention of 1949 continues to provide that prisoners of war are ‘in all circumstances entitled to respect for their persons and honour’ and that ‘women shall be treated with all regard due to their sex’.<sup>168</sup> The Fourth Geneva Convention is more explicit and provides that civilian ‘women shall be especially protected against any

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165 See, for example, Gardam (n 155).

166 As early as the Lieber Code of 1863, article 44 providing that:

All wanton violence committed against persons in the invaded country... all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other such severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such behavior.

167 Gaggioli, G. (2014). Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross*, 96(894), 503-538, 511-517.

168 Third Geneva Convention (n 43), article 14.

attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.<sup>169</sup> Additional Protocol I provides that 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault', are 'prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents'.<sup>170</sup> Two additional provisions protect specifically women 'against rape, enforced prostitution and any other form of indecent assault'<sup>171</sup> and children 'against any form of indecent assault'.<sup>172</sup>

Common Article 3 implicitly also prohibits sexual violence when it outlaws 'violence to life and person, in particular ... mutilation, cruel treatment and torture' as well as 'outrages upon personal dignity, in particular humiliating and degrading treatment'. It is complemented by Additional Protocol II, which, where/when applicable, prohibits, in the provision on fundamental guarantees, 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' for civilians and persons hors de combat.<sup>173</sup> This is the first IHL provision explicitly prohibiting rape without distinction between women and

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169 Fourth Geneva Convention (n 43), article 27.

170 Protocol I (n 11), article 75(2)(b).

171 Ibid, article 76(1)

172 Ibid, article 77(1).

173 Protocol II (n 15), article 4(2)(e).



men. Customary IHL also prohibits rape and other forms of sexual violence.<sup>174</sup> According to the ICRC Customary Law Study, this prohibition has been found to apply both in international and non-international armed conflicts and protects women, girls, boys and men.<sup>175</sup>

In addition to establishing the presence of conflict, and the occurrence of sexual violence, a further critical element is required to amount to a violation of IHL. Even when committed in times of armed conflict, sexual violence is not necessarily an IHL violation. The term ‘conflict-related sexual violence’ is not used in IHL treaties and – to quote Gaggioli – ‘is not properly legal’.<sup>176</sup> Rather, the term conflict ‘nexus’ is used in IHL. This is a complex area, in which there has been significant (and ongoing) jurisprudential development.<sup>177</sup> Sufficed to explain for the purpose of the chapter by means of the following example:

In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment – as he may have done already in peacetime – without this act having any link to the armed conflict situation, IHL would not apply to the act. On the other

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174 International Committee of the Red Cross, Customary IHL Database, Rule 93, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93).

175 Ibid.

176 Gaggioli (n 167), 513.

177 For an overview, see van der Wilt, H. (2012). War Crimes and the Requirement of a Nexus with an Armed Conflict. *Journal of International Criminal Justice*, 10(5), 1113–1128.

hand, in the same armed conflict, if the military commander rapes a person detained for reasons connected to the armed conflict, such an act clearly constitutes a violation of IHL (and human rights law). The nexus derives from a number of elements here: the identity of the perpetrator (a military commander), the identity of the victim (a person detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power).<sup>178</sup>

These apparently restrictive definitions of conflict, women's rights and sexual violence in conflict further ground broad feminist disengagement from IHL.

### *International Criminal Law*

ICL has offered considerable promise to feminists in the definition of conflict in one important respect, that bring the law closer to women's lived experience: ICL has all but abandoned the distinction between international and non-international armed conflicts. (In practical terms, given the absence of enforcement provisions attached to Common Article 3 and Additional Protocol II, this is especially significant from an enforcement perspective.) In *Tadić*, the ICTY ruled that it had, albeit by implication, jurisdiction over Common Article 3 crimes.<sup>179</sup> Its sister court, the ICTR, had express jurisdiction over breaches of Common Article 3 and Additional Protocol II,<sup>180</sup> and the ICC has jurisdiction over crimes committed during a non-international armed

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178 Gaglioli (n 167), 515.

179 *Tadić* (n 135), paragraphs 97-98, 117, 119-125.

180 ICTR Statute (n 48), article 4.

conflict.<sup>181</sup> The ICTY decision suggests that the customary law on non-international armed conflicts is essentially the same as for international armed conflicts. The *Tadić* case and the 2005 ICRC study have determined that under customary international law, the IHL rules on international and non-international armed conflicts are in essence much the same, and according to the ICRC study the majority of IHL rules (though not all) apply to both types of conflict.<sup>182</sup> The ICC Statute has also been instrumental in this regard. So, the sensible course for a force commander is to treat *any* military operation as if it is an *international* armed conflict, and to approach women's rights accordingly.

Indeed, ICL can apply even in the absence of armed conflict. While prosecution for war crimes requires the presence of armed conflict,<sup>183</sup> there is no such requirement for the prosecution of crimes against humanity. Therefore certain violations of women's rights will only fall within the ICC's jurisdiction if committed in the context of a 'widespread or systematic attack directed against any civilian population',<sup>184</sup> but the presence of conflict *per se* is not required.<sup>185</sup> Likewise, in order to establish individual

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181 Rome Statute (n 43), article 8(2)(c).

182 *Tadić* (n 135), paragraphs 97-98, 117, 119-125. For an assessment of these findings, see C. Greenwood, 'International humanitarian law and the *Tadić* case,' *European Journal of International Law*, Vol. 7, 1996, 265.

183 Rome Statute (n 43), article 8.

184 See further *Akayesu* (n 56), paragraph 580.

185 In addition, the Rome Statute includes persecution on the grounds of gender as constitutive of crimes against humanity. According to Moshan:

criminal responsibility for genocide, the constitutive acts must have been conducted with the specific intent to destroy an ethnic, racial, religious or national group, but there is no requirement for the presence of conflict.<sup>186</sup>

The failure of the post World War II Nuremberg and Tokyo Tribunals established by Allied Powers, within an emerging regime of ICL, to prosecute crimes of sexual violence is a matter of historical record.<sup>187</sup> Established with limited heads of jurisdiction and to pursue prosecution for the most serious of crimes against peace, war crimes and crimes against humanity,<sup>188</sup> sexual violence as a gendered harm was consigned to either privacy or ‘less serious’ domain of impunity. The failure to

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The inclusion of gender-based persecution as a crime against humanity adds validity to the concept of gender-based crimes. In addition, this inclusion may prove helpful in the prosecution of war criminals who rape or otherwise violate women as an expression of their misogyny, rather than as a means of persecuting a particular ethnic or religious group.

Moshan, B. S. (1998). Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity. *Fordham International Law Journal*, 22, 154. 182.

186 Rome Statute (n 43), article 6.

187 See further Ní Aoláin (n 153).

188 Charter Annexed to the Agreement for the Establishment of an International Military Tribunal, 8 August 1945, 5 UNTS 15; Charter of the International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946.

criminalise and prosecute gender and sexual-based crimes at Nuremberg and Tokyo cast a long shadow over prospects for gender justice in ICL. However, the stark revelations of the extent of sexual violence in the early 1990s Balkans conflict and Rwandan genocide coincided with the development and codification of ICL as a regime of international law. The coincidence of concerted feminist activism and a new dynamic period in the evolution of ICL quickly recorded its impact on the practice and priorities of the ad hoc Tribunals established by the UNSC for the former Yugoslavia and Rwanda.

Due to both the inauspicious starting point, and the highly dynamic nature of ICL in the 1990s, it is these set of developments on women's rights that are most difficult to capture succinctly. Further, the pace of development continues to be rapid, as the ICC has finally turned its attention in a more concerted manner to the prosecution of harms against women. As this short overview will reveal, while there have been considerable advances in the prosecution of gender harm, the underpinning definition of women's rights remains closely moored to questions of physical and sexual personhood. The potential in the Rome Statute to advance a definition of women's rights that encompasses economic and social rights is, to date, significantly under-developed.<sup>189</sup>

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189 See further Schmid. E. (2015). *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* Cambridge and New York: Cambridge University Press, discussion of gender implications, 33-34.

Historically, while it has long been accepted that crimes of sexual violence are contrary to the laws of war<sup>190</sup> and customary international law, the foundational statutes remained silent on the status of rape as a war crime or a constitutive act of crimes against humanity. Nevertheless, the early jurisprudence of the ad hoc tribunals for Rwanda and the former Yugoslavia determined these questions definitively. As noted, in a series of landmark judicial developments of ICL, rape was held to constitute a grave breach of the Geneva Conventions,<sup>191</sup> constitutive of a crime against humanity<sup>192</sup> and genocide.<sup>193</sup> The Rome Statute codified these developments and went beyond them by explicitly recognizing rape, sexual slavery, enforced prostitution, pregnancy and sterilization and other forms of sexual violence as crimes against humanity and as war crimes.<sup>194</sup> Unlike the Nuremberg Charter and the Statutes of the ad hoc tribunals, which limited persecution as a crime against

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190 Chinkin, C. (2009). Gender-related Violence and International Criminal Law and Jurisprudence. In A. Cassese (Ed.), *Oxford Companion to International Criminal Justice* (pp. 75-81). Oxford & New York: Oxford University Press, page 76, confirmed by *Delalic and others* (IT-96-21) TJ 16 November 1998, paragraph 145.

191 *Tadic* (n 54).

192 ICTY Statute (n 49), article 5(g); ICTR Statute (n 48); Rome Statute (n 43), article 8; SCSL Statute (n 45), article 2(g).

193 See *infra* text at nn 54-56.

194 Rome Statute (n 43), article 7 and 8.

humanity to political, racial and religious grounds, the Rome Statute includes persecution on gender grounds within this rubric.<sup>195</sup>

Away from the drama and intrigue of the ICC, some ostensibly more progressive developments regarding the definition of women's rights have been advanced. Of note, in particular, is the forced marriage jurisprudence of the Special Court for Sierra Leone, a hybrid court with elements of domestic and international jurisdiction.<sup>196</sup> The Prosecutor argued that the 'bush wife' phenomenon – the capture of women who were then 'married', forced to have sex with their abductor and to bear their children – was not adequately captured by offences such as rape or enslavement. Subsequent indictments included forced marriage as a crime against humanity<sup>197</sup> (under the rubric of 'other inhumane acts'<sup>198</sup>), evidencing ongoing efforts to capture more fully women's experiences in armed conflict and genocide within existing offences.<sup>199</sup>

A more nuanced and potentially more comprehensive approach to women's rights is articulated in the 2014 Policy Paper on Sexual and Gender-based Crimes from the

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195 Rome Statute (n 43), article 7(1)(h).

196 See further Gekker, E. (2014). Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten-Year-Old Rule but Overlooks New Jurisprudence. *Hastings Women's Law Journal* (Winter), 105-133.

197 *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-2004-16-PT, Further Amended Consolidated Indictment, 18 February 2005.

198 SCSL Statute (n 45), article 2(i).

199 See further Chinkin (n 190), 78.

ICC's Office of the Prosecutor (OTP). The document, in line with the preceding jurisprudence, focuses also on ending impunity for sexual crimes and ensuring that such acts are charged as forms of other violence within the competence of the Court where the material elements are met, for example, charging rape as torture.<sup>200</sup> While the document notes that not all gender crimes manifest as forms of sexual violence,<sup>201</sup> the document is in practice dedicated to improving institutional commitment and capacity for the prosecution of crimes involving sexual violence. The Policy Paper is justly celebrated for operating to a more nuanced construction of gender than the one defined in the Rome Statute, namely:

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.<sup>202</sup>

Instead, the Policy Paper addressed gender as constructed, non-binary and implicating sexual orientation.<sup>203</sup> It is, nevertheless, limited by the broader failure of the Statute and ICL to 'tak[e] economic, social and cultural rights seriously'. The disappointing failures of the Court to meaningfully discharge its reparations mandate to date is

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200 International Criminal Court Office of the Prosecutor (2014). Policy Paper on Sexual and Gender-Based Crimes. The Hague: ICC, 6.

201 Ibid, 16.

202 Rome Statute (n 43), article 7(3).

203 Oosterveld, V. (2014). Constructive Ambiguity and the Meaning of 'Gender' for the International Criminal Court. *International Feminist Journal of Politics*, 16(4), 563-580.



further evidence of this broader failing to address the adverse impact of conflict on women's social and economic rights.<sup>204</sup>

Due to its focus on individual criminal prosecution, the definition of rape under ICL must include a clear and specific articulation of the crime's objective (*actus reus*) elements. A full description of the evolution of the relevant jurisprudence is beyond the scope of the chapter, however the ICC Elements of Crimes integrate case-law evolutions and provide a definition of rape that is generally accepted by the

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204 Chappell, L. (2017). The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court. *International Journal of Human Rights*.

international community as the most authoritative such definition.<sup>205</sup> This definition requires *inter alia* ‘penetration, however slight’ of the victim or perpetrator, committed ‘by force, or by threat of force or coercion... or by taking advantage of a coercive environment’.<sup>206</sup> The definition thus involves physical and contextual elements.

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205 For instance, the World Health Organization (WHO) relies on this definition, see WHO (Eds.). Krug, E.G., Dahlberg L.L., Mercy, J.A., Zwi, A.B. and Lozano, R. (2002). *World Report on Violence and Health*. Geneva: World Health Organization [https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615\\_eng.pdf;jsessionid=0F7CE8CC1EB4AE86B40025DF0BCC69A7?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf;jsessionid=0F7CE8CC1EB4AE86B40025DF0BCC69A7?sequence=1). In addition, a number of national legislations have been adopted or modified to include the crime of rape and other sexual crimes as defined by the ICC. See the national legislations of Australia, Belgium, Canada, Georgia, New Zealand, the Republic of Korea, South Africa and the United Kingdom, International Committee of the Red Cross, IHL Customary Law Database, Rule 93, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93). See also, e.g., Weiner, P. (2013). The Evolving Jurisprudence of the Crime of Rape in International Criminal Law. *Boston College Law Review* 54(3), 1207-1237, 1218, cited in Gaggiolo (n 167), 509.

206 International Criminal Court. (2011). Elements of Crimes. The Hague, article 8(2)(b)(xxii):

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

The definition of sexual violence more broadly under ICL is relatively inclusive. In the *Akayesu* case, the ICTR Trial Chamber held that sexual violence is ‘any act of a sexual nature which is committed on a person under circumstances which are coercive’.<sup>207</sup> The term ‘act of a sexual nature’ is very broad. It may range from penetration to comments having a sexual connotation. ‘Coercion’ moreover must be understood broadly as including not only a show of physical force but also ‘[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation’.<sup>208</sup> The Trial Chamber further held that ‘sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact’.<sup>209</sup> From this definition, it is clear that sexual

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perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

<sup>207</sup> *Akayesu* (n 56), paragraph 688; *Prosecutor v. Alfred Musema*, ICTR, Case No. ICTR-96-13, Judgment (Trial Chamber), 27 January 2000, paragraph 965.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Akayesu* (n 56), paragraph 688.

violence encompasses and is broader than rape, but a minimum threshold of gravity to consider an act as ‘sexual violence’ is not immediately clear.<sup>210</sup>

The Rome Statute criminalizes ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence *of comparable gravity*’.<sup>211</sup> This is a non-exhaustive list of the most serious forms of sexual violence falling under the jurisdiction of the ICC, which does not help to define the minimum gravity threshold for an act to be considered ‘sexual violence’. Gaggioli provides a helpful overview of additional concrete examples of sexual violence drawn from case law and legal writings: for instance, trafficking for sexual exploitation,<sup>212</sup> mutilation of sexual organs,<sup>213</sup> sexual exploitation (such as obtaining sexual services in return for

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210 Gaggioli (n 167), 506.

211 Rome Statute (n 43), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) (emphasis added).

212 See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319, article 3.

213 *Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7, Judgment (Trial Chamber), 18 December 2008, paragraph 976.

food or protection),<sup>214</sup> forced abortions,<sup>215</sup> enforced contraception,<sup>216</sup> sexual assault,<sup>217</sup> forced marriage,<sup>218</sup> sexual harassment (such as forced stripping),<sup>219</sup> forced inspections for virginity<sup>220</sup> and forced public nudity have been qualified as sexual violence.<sup>221</sup>

ICL requires a conflict-nexus in order to establish that a war crime has occurred. The question of conflict nexus has been extensively litigated, but is defined to broad acceptance by the ICTY Appeals Chamber in the *Kunarac* case. The Appeals Chamber confirmed that what distinguishes a war crime from, for example, a purely

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214 Bastick, M., Grimm, K. and Kunz, R. (2007). *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector*. Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 19; See also WHO (n 205).

215 Ibid, 19; WHO (n 205), 149.

216 Ibid.

217 See Fourth Geneva Convention (n 43), article 27; Protocol 1 (n 11), article 75(2)(b); Protocol II (n 15), article (4)(2)(e); Rome Statute (n 43), article 8(2)(e)(vi); ICTR Statute (n 48), article 4(e); SCSL Statute (n 45), article 3(e); and UN Transitional Administration in East Timor, Regulation No. 2000/15, Section 6.1(e)(vi).

218 Bastick et al (n 214), 49; WHO (n 205), 149.

219 *Akayesu* (n 56), paragraph 693.

220 Bastick et al (n 214), 19; WHO (n 205), 150.

221 *Akayesu* (n 56), paragraph 688; *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23&23/1 (Trial Chamber), 22 February 2001, paragraphs 766–774.

domestic criminal offence is the armed conflict ‘environment’ in which it is committed. The conflict must be important to the perpetrator’s ‘ability’, ‘decision’, ‘manner’ or ‘purpose’ to commit the crime. Ultimately, if the perpetrator ‘acted in furtherance of or under the guise of the armed conflict’, that would establish the necessary nexus.<sup>222</sup> The Appeals Chamber went on to identify a number of factors determine whether or not an alleged offence is sufficiently related to the armed conflict to constitute a war crime. These factors included:

the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the crime is committed as part of or in the context of the perpetrator’s official duties.<sup>223</sup>

Along the lines of the ad hoc tribunal case law, the ICC Elements of Crimes provide that for a war crime to exist, it must be committed ‘in the context of and associated with’ an armed conflict.<sup>224</sup> The wording ‘in the context of’ refers to the existence of an armed conflict, and ‘associated with’ refers to the nexus requirement. Conflict-related sexual violence must thus be committed by a person (whether combatant or civilian) in the context of and associated with an armed conflict in order to amount to a war crime under the Rome Statute. Ultimately, the determination is made on a case-

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<sup>222</sup> *Prosecutor v. Dragoljub Kunarac and Others*, ICTY Case No. IT-96-23&23/1 (Appeals Chamber), 12 June 2002, paragraph 58.

<sup>223</sup> *Ibid*, paragraph 59.

<sup>224</sup> See, for instance, International Criminal Court (n 206), article 8(2)(a)(i)-1.

by-case basis. It is clear that this conflict nexus requirement mitigates against the broad definition of ‘conflict-related sexual violence’ now prominent in relevant policy-making and advocated in much feminist literature.<sup>225</sup> Indeed, this conflict nexus requirement has been a key line of feminist critique in ICL.<sup>226</sup>

### *International Human Rights Law*

There are a number of potential ways in which conflict may be defined under IHRL. While the traditional position was that IHRL applied in peacetime and IHL in armed conflict, it is now widely recognised that IHRL continues to apply in amended form in armed conflict.<sup>227</sup> Rather, human rights treaty obligations continue, except in so far as

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225 For a discussion of relevant literature, see Swaine, A. (2015). Beyond Strategic Rape and Between the Public and Private: Violence Against Women in Armed Conflict. *Human Rights Quarterly* 37(3), 755 – 786.

226 For overview, see O'Rourke, C. (2013). International Law and Domestic Gender Justice: Why Case Studies Matter. In M. Fineman & E. Zinstag (Eds.), *Feminist Perspectives on Transitional Justice* (pp. 11-41). Antwerp: Intersentia.

227 For example, the Human Rights Committee has been clear that the International Covenant on Civil and Political Rights applies also in situations of armed conflict to which the rules of IHL are applicable, Human Rights Committee. (2001). General Comment 29, States of Emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 and Human Rights Committee. (2004). General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13. See generally United Nations Office of the High

the more specialist obligations, or *lex specialis*, of IHL applies. The relationship between IHL and IHRL is more appropriately explored in Chapter 3. Suffice to say, in determining when the *lex specialis* applies, IHRL defers to IHL's definition of conflict.

The further definition of conflict under IHRL relies on the system of derogations. IHRL permits states to derogate from certain obligations in times of 'public emergency' (though the right to life, freedom from torture, inhuman and degrading treatment, slavery, arbitrary detention and freedom of thought are non-derogable). States exercising this authority to derogate certain civil and political rights are thus known as 'states of emergency'.<sup>228</sup> To reach the threshold of 'public emergency', the situation must 'threat[en] the life of the nation'.<sup>229</sup> Interestingly, however, the Human Rights Committee has made clear that the presence of an armed conflict, whether internal or international, does not necessarily imply that the threshold has been reached for the state to derogate from its human rights obligations.<sup>230</sup> Thus, 'public emergency' and conflict are not synonyms under IHRL. Even the state in armed

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Commissioner for Human Rights (2011). *International Legal Protections of Human Rights in Armed Conflict*. New York and Geneva.

228 See further Gross, O., & Ní Aoláin, F. (2006). *Law in Times of Crisis: Emergency Powers in Theory and in Practice*. Cambridge University Press: Cambridge and New York.

229 ICCPR (n 71), article 4.1; Human Rights Committee (n 227); *Lawless v Ireland* (No.1), ECtHR, Application No. 332/57, 1960.

230 Human Rights Committee (n 227), paragraph 3.



conflict must justify derogations on the basis that the conflict threatens the life of the nation.

Also relevant to this discussion are the limitations on the economic, social and cultural rights permitted under the International Covenant on Economic, Social and Cultural Rights.<sup>231</sup> Unlike derogations, there is no requirement for a ‘public emergency’ in order for state parties to impose limitations on rights guaranteed under Covenant. Thus, while conflict may activate such limitations, it is not a pre-requisite. Instead, limitation clauses apply across the spectrum, from everyday public order maintenance and policing strategies to national security and large-scale military actions. Importantly, limitations are permitted on one ground alone, namely that they advance the general welfare of the population. Further, the *travaux préparatoires* on the Covenant’s limitations clause makes clear that that no limitations for reasons of public order, public morals or the respect for rights and freedoms of others should be

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231 ICESCR (n 72), article 4: The States parties to the present Covenant recognize that, in the enjoyment of those rights proscribed by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

permitted.<sup>232</sup> Limitation clauses are included in various rights provisions such as article 14 (access of the press and public to criminal trials), article 12 (freedom of movement) and article 22 (freedom of association). These latter limitation clauses are phrased in terms of permitting those restrictions that ‘are necessary in a democratic society’.<sup>233</sup>

The CEDAW treaty text includes neither an explicit nor implicit definition of conflict. CEDAW does not specify its application to armed conflict—in contrast, for example, to the Convention on the Rights of the Child.<sup>234</sup> Neither do its provisions expressly address the needs and rights of women that prevail in conflict-affected settings. Further, CEDAW does not permit derogations.<sup>235</sup> Looking to CEDAW Committee practice, the Committee has continued to scrutinise treaty-compliance of state parties affected by conflict.<sup>236</sup> Arguably, therefore, the Convention and Committee neither

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232 Summary Record of the 234th meeting of the UN Commission on Human Rights, 2 July 1951, E/CN.4/SR.234 at 23. Similar. See further Müller, A. (2009). Limitations and Derogations to Economic, Social and Cultural Rights. *Human Rights Law Review* 9(4), 557-601.

233 ICCPR (n 71), articles 12, 14, and 22.

234 CRC (n 74), article 38.

235 See generally O'Rourke, C., & Swaine, A. (2018). CEDAW and the UN Security Council Women, Peace and Security Resolutions: Advancing Accountability for Women's Rights in Conflict. *International and Comparative Law Quarterly* 67(1), 167-199.

236 For an overview, see further *ibid.*

include nor require a definition of conflict. Nevertheless, in GR30, the Committee made clear its definition of conflict – a notably broad one – that includes but goes beyond IHL definitions of conflict, occupation and internal disturbance, as well as human rights law definitions of public emergency:

The general recommendation covers the application of the Convention to conflict prevention, international and non-international armed conflicts, situations of foreign occupation, as well as other forms of occupation and the post-conflict phase. In addition, the recommendation covers other situations of concern, such as internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime, that may not necessarily be classified as armed conflict under IHL and which result in serious violations of women's rights and are of particular concern to the Committee.<sup>237</sup>

Human rights treaty bodies are typically motivated to define conflict restrictively, in order to ensure the continuing application of treaty obligations to the greatest extent possible. By contrast, the CEDAW Committee offers a broad definition of conflict in GR30. The Committee thereby makes clear that all CEDAW obligations continue to apply in these circumstances. Further, the broad definition is appropriate because all

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237 Committee for the Elimination of All Forms of Discrimination against Women. (2013). General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations. UN Doc CEDAW/C/GC/30, paragraph 4.

of these various manifestations of conflict adversely impact women's rights, irrespective of conflict intensity.

In order to understand the definition of women's rights in conflict under IHRL, it is first important to understand the hierarchy of rights in the canon. First and foremost, some rights are recognized as having a special status as peremptory norms of customary international law (*jus cogens*), which means that no derogation is admissible under any circumstance, including conflict. These rights prevail over other international obligations and include the prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination. These rights are widely recognized as peremptory norms.<sup>238</sup> It is therefore not possible to reserve, limit or derogate from these *jus cogens* rights, even in times of armed conflict. Foundational feminist critique of *jus cogens* challenges the supposed universality of concept, for example, in singling out racial but not also gender discrimination.<sup>239</sup> Moreover, the condemnation of exclusively civil and political rights violations underpins further feminist critique.<sup>240</sup>

Second, feminist scholarship has identified a gender hierarchy within IHRL, in terms of differential status afforded to so-called 'first generation' civil and political rights

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238 International Law Commission. (2001). Report of the International Law Commission on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001). UN Doc. A/56/10, Part 1, Ch.5, 84.

239 See, paradigmatically, Charlesworth, H. and C. Chinkin (1993). 'The Gender of Jus Cogens.' *Human Rights Quarterly* 15: 63 - 76.

240 Ibid.

and ‘second generation’ economic, social and cultural rights.<sup>241</sup> This gender hierarchy is further compounded by a gender disaggregation of human life between ‘private sphere’ activities of family and home, free from state interference, and ‘public sphere’ domain in which the citizen is entitled to make demands of the state. While protections and obligations may formally apply without discrimination on the basis of gender, it is in practice women who spend most of their lives in the private sphere and men who predominate in the public sphere. The development of the due diligence doctrine in the early 1990s transformed the regime of IHRL in its applicability to the lives and rights of women, by imposing state liability for violations perpetrated by non-state actors.<sup>242</sup> This is a hierarchy that becomes even more pronounced in times of conflict, due to differential protection afforded to non-derogable civil and political rights vis-à-vis economic, social and cultural rights, which are subject to broad limitations.

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241 Charlesworth and Chinkin (n 4), 231-240.

242 Principle established in *Velasquez Rodriguez v Honduras*, (Ser. C) No. 4 (1988) IACHR, Judgment, 29 July 1988. For its modern application to women’s rights, see further Byrnes, A. and Bath E. (2008). ‘Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women - Recent Developments.’ *Human Rights Law Review* 8: 517.

These are hierarchies that the CEDAW Committee has attempted to address throughout its activities, in particular in respect of conflict through GR30.<sup>243</sup> The Committee has therefore advanced a broader and more inclusive definition of women's rights in conflict than can be found elsewhere under IHRL. The bulk of the General Recommendation is dedicated to articulating the ways in which the rights guaranteed under CEDAW are impacted by conflict, specifically the prohibition of discrimination in law, policy and custom;<sup>244</sup> the obligation on states to challenge discriminatory social and cultural patterns;<sup>245</sup> the prohibition on trafficking;<sup>246</sup> the right to political participation in domestic and international affairs;<sup>247</sup> access to education, employment, health;<sup>248</sup> and the rights of rural women;<sup>249</sup> right to

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243 Pramilla Patten statement to 'Arria Formula Meeting on linkages between Security Council on Resolution 1325 and CEDAW GR 30', 5 December 2016, New York, United Nations.

244 Committee on the Elimination of All Forms of Discrimination Against Women (n 237), paragraphs 10, 34-37; 53-56; 58-60.

245 Ibid, paragraph 34-37.

246 Ibid, paragraph 39-40.

247 Ibid, paragraphs 42-46, 70-72.

248 Ibid, paragraphs 48-51.

249 Ibid.

nationality;<sup>250</sup> right to equality in marriage and family relations;<sup>251</sup> and the right to enter into contracts.<sup>252</sup> GR30 notes the consequent obligations on states to remedy violations caused by conflict and makes several recommendations to states parties to this end.<sup>253</sup> In practice, due to its pluralist nature, diverse definitions of women's rights prevail under IHRL.

The so-called 'mainstream' international human rights system is now a site of considerable success in terms of feminist engagement and the broad affirmation of women's rights. These successes are most pronounced in respect of violence against women, which the HRC, CERD and CESCR have all made important progress in recognising as a violation of treaty obligations under their mandate.<sup>254</sup> Further, the

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250 Ibid, paragraphs 58-60.

251 Ibid, paragraphs 62-64.

252 Ibid, paragraphs 74-80.

253 Ibid, paragraphs 12, 17, 24, 28, 33, 38, 41, 46, 52, 57, 61, 65, 69, 73, 81, 82-86.

254 Human Rights Committee. (2000). General Comment No. 28: Equality of Rights Between Men and Women (Article 3). UN Doc. CCPR/C/21/Rev.1/Add.10, paragraph 11; Committee on Elimination of Racial Discrimination. (2000). General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination. UN Doc. HRI/ GEN/1/Rev.7; Committee on Economic, Social and Cultural Rights. (2005). General Comment 16: The Equal Rights of Women and Men. UN Doc. E/C.12/2005/4, paragraph 27. See generally Edwards, A. (2011). *Violence Against Women under International Human Rights Law*. Cambridge: Cambridge University Press.

mainstream human rights system has arguably gone further than the CEDAW Committee in robustly articulating women's reproductive rights.<sup>255</sup> Nevertheless, the impact of conflict on these rights and obligations is broadly under-articulated within the mainstream human rights system. In its treatment of conflict, the mainstream human rights system has instead concentrated its activity on the issue of derogations. Thus, the practice of derogations and limitations, their scope and operation, has largely proceeded without meaningful reflection as to its gendered implications and the resulting definition of women's rights in conflict.

In terms of the regime's definition of sexual violence, most human rights treaties, universal and regional, do not contain explicit reference to sexual violence.<sup>256</sup> Moreover, even those that do reference sexual violence lack a clear definition of the phenomenon.<sup>257</sup> Further, even the influential CEDAW Committee General

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255 See generally Zampas and Gher (n 97); see specifically *K.L. v. Peru*, HRC, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003; *LMR v. Argentina*, HRC, Communication No. 2324/2013, UN Doc. CCPR/C/101/D/1608/2007; *Mellet v. Ireland*, HRC, Communication No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013; *Siobhan Whelan v Ireland*, HRC, Communication No. 2425/2014, UN Doc. CCPR/C/119/D/2425/2014.

256 There are rare exceptions, for example, the CRC (n 74) provides that States Parties must protect children from all forms of sexual exploitation and sexual abuse, article 19(1) and 34.

257 See, for example, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 11 May 2011, 3011 UNTS Reg No



Recommendation Number 19 on Violence Against Women nowhere uses the term ‘sexual violence’; rather it refers to sexual assault (including in wars, paragraph 16), sexual harassment (with reference to discrimination in the workplace), sexual abuse (within families) and sexual exploitation (with reference to article 6).<sup>258</sup> This apparent silence on the definition of sexual violence reflects the CEDAW-led human rights approach, which defines first ‘gender-based violence against women’ as ‘violence that is directed against a women because she is a women or that affects women disproportionately’.<sup>259</sup> CEDAW further categorises gender-based violence against women not primarily by forms (or manifestations), but by the sites in which they take place, namely violence in the family, violence in the community and violence perpetrated or condoned by state agents.<sup>260</sup> (This is an approach to definition adopted also by the UN Special Rapporteur on Violence Against Women.<sup>261</sup>) As sexual

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52313; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 9 June 1994, 33 ILM 960; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, UNTS Reg No 26363.

258 Committee on the Elimination of All Forms of Discrimination Against Women. (1991). General Recommendation Number 19 on Violence Against Women. UN Doc. A/47/38, part.1, 1-8.

259 Ibid, part.1, 1.

260 See further Freeman et al (n 93), 443-474.

261 See, paradigmatically, UN Special Rapporteur on violence against women, its causes and consequences. (1994) Preliminary report submitted by the Special

violence occurs across all three sites, an encompassing definition of specifically ‘sexual’ violence is not apparent from the Committee’s activities. In its General Recommendation Number 35, which updates General Recommendation Number 19 on Violence Against Women, the Committee does stipulate that States must ‘[e]nsure that sexual assault, including rape is characterised as a crime against women’s right to personal security and their physical, sexual and psychological integrity’.<sup>262</sup> Thus, while the Committee offers a definition of how the crime should be framed in law, it does not offer an explicit definition of the elements of the violation itself.

IHRL is arguably unique in its definition of sexual violence by expressly articulating a relationship between sexual violence against women and broader gender inequality. This articulation took some time to emerge. Indeed, the CEDAW Convention is

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Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45. UN Economic and Social Council. UN Doc. E/CN.4/1995/42.

262 Committee on the Elimination of All Forms of Discrimination Against Women. (2017). General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. UN Doc. CEDAW/C/GC/35, paragraph 33.

The paragraph continues:

Ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances. Any time limitations, where they exist, should prioritise the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/authorities.

formally silent on the issue of violence against women. Nevertheless, the CEDAW Committee's General Recommendation Number 19 was foundational in articulating this relationship between violence against women (including sexual violence) and gender discrimination on a number of grounds: first, by identifying that much violence was directed against women because of her gender;<sup>263</sup> second, that particular forms of violence affected women disproportionately, both in their impact and scale;<sup>264</sup> third, that there were patterns of state complicity and inactivity in addressing certain forms of violence that disproportionately impacted women;<sup>265</sup> fourth, that violence against women had an important role in making women unequal by preventing their access to rights;<sup>266</sup> and, finally, that violence against women had a critical role in maintaining women's inequality.<sup>267</sup> The CEDAW Committee's approach has enjoyed a good deal of uptake within the other human rights treaty-bodies,<sup>268</sup> and thus broad penetration within IHRL.

Much litigated is the question of when sexual violence against women meets the necessary threshold to constitute torture, and is therefore prohibited as a matter of *jus*

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263 Committee on the Elimination of All Forms of Discrimination Against Women (n 258), paragraph 6.

264 Ibid, paragraph 6.

265 Ibid, paragraph 9.

266 Ibid, paragraph 7.

267 Ibid, paragraph 11.

268 For a full discussion, see Edwards, A. (2011). *Violence Against Women under International Human Rights Law*. Cambridge: Cambridge University Press, 185-6.

*cogens*, irrespective of the presence of armed conflict or the status of the victim. In the CEDAW Committee's General Recommendation Number 35, the Committee offered the following definition:

The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, *a gender sensitive approach is required to understand the level of pain and suffering experienced by women*, and that the purpose and intent requirement of torture are satisfied *when acts or omissions are gender specific or perpetrated against a person on the basis of sex*.<sup>269</sup>

These elements of a human rights-based approach to determining whether sexual violence meets the threshold of torture are therefore gender-sensitive in two respects, first in determining whether the consequent harm is sufficiently serious and, second, in recognising the gender-based purpose or intent.<sup>270</sup>

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269 Ibid, paragraph 17 [emphasis added].

270 According to the Committee on the Elimination of All Forms of Discrimination Against Women (n 262), paragraph 18, examples of gender-based violence that may meet this threshold include:

Violations of women's sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are

Finally, the UNSC operates to a threshold of ‘threat to international peace and security’. In order to activate Chapter VII powers, the UNSC must first determine that there is a threat to the peace, breach of the peace or act of aggression.<sup>271</sup> The broadest and least distinct concept in article 30 is that of threat to the peace.<sup>272</sup> (In practice, it is almost the only one used by the UNSC, whereas the other two are usually not specifically determined.) In the conception of the Charter, the most typical case of a threat to the peace is that of an impending armed conflict, however, in practice it is a category much more widely invoked. To illustrate, the UNSC has found ongoing conflict to constitute threat to the peace, for example ‘continued fighting’ between Ethiopia and Eritrea.<sup>273</sup> In addition, the UNSC has regarded post-conflict situations as threats to the peace, and on this basis, it has for example taken wide-ranging measures against Iraq and authorized peacebuilding operations in Bosnia, Kosovo and East Timor.<sup>274</sup> Further, while the concept may initially have implied inter-state conflict, the UNSC quickly abandoned such a reading.<sup>275</sup> In addition, the UNSC has regarded post-conflict situations as threats to the peace, and on this basis, it has for example

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forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

271 UN Charter (n 69), article 39

272 Simma et al (n 104), 722.

273 UNSC Resolution 1298 (2000).

274 Simma et al (n 104), 723.

275 Ibid, 723.

taken wide-ranging measures against Iraq and authorized peacebuilding operations in Bosnia, Kosovo and East Timor.<sup>276</sup> The Council is uniquely authorised to determine whether conflict, violence and instability constitute a ‘threat to international peace and security’. This is a definition deliberately designed to afford the Council a very significant breadth of discretion, which it has been shown to exercise with enormous selectivity.

The dedicated activity of the UNSC on issues of Women, Peace and Security (WPS) since the adoption of Resolution 1325 in 2000 has moved the UNSC to the epicentre of policy and advocacy concerning women’s rights in conflict under international law. Given the UNSC’s historical lack of engagement on matters of human rights,<sup>277</sup> much less women’s rights, this turn in the regulation of women’s rights in conflict under international law is surprising. The Charter provisions dealing with the powers of the UNSC make no formal reference to human rights, nevertheless, the Charter’s preambular and article 1 commitments to ‘promote and encourage respect for human rights’ imply a role for all UN organs. These Charter provisions have been the subject of highly varying interpretation by the UNSC during the seven decades of its operation.<sup>278</sup>

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276 Ibid.

277 See generally Bailey, S.D. (1994). *The UN Security Council and Human Rights*. New York: St Martin’s Press; Genser, J. and Stagno Ugarte, B. (2014). *The United Nations Security Council in the Age of Human Rights*. New York: Cambridge University Press.

278 Genser and Stagno-Ugarte, *ibid*.

The end of the Cold War brought a new era of human rights across the wider UN system,<sup>279</sup> and with it increasing scrutiny of the UNSC and its legitimacy, including calls for the Council to reform, to democratise and to address the impact on human rights of its own operations.<sup>280</sup> These calls for reform overlapped with a feminist spotlight on rights violations impacting women in conflicts such as the former Yugoslavia and Rwanda, and calls for a re-focus by the UNSC on the people affected by conflict and by its operations.<sup>281</sup> This re-focusing is most clearly evidenced in the Council's thematic activity on the protection of civilians<sup>282</sup> and on the themes of Children and Armed Conflict (CAC),<sup>283</sup> and WPS. Its actions, such as advancing sanctions for use of child soldiers, not only had a bearing on other thematic agenda items, but also provided a model for the kinds of measures that it could advance in respect of thematic and human rights issues broadly.<sup>284</sup> The final critical step towards

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279 See generally Mertus, J. (2009). *The United Nations and Human Rights: A Guide for a New Era*. 2nd ed. Abington and New York: Routledge.

280 Otto, D. (2006). Securing the 'Gender Legitimacy' of the UN Security Council: Prising Gender from its Historical Moorings. In H. Charlesworth. and J.M. Coicaud, (eds), *Fault Lines of International Legitimacy*. New York: Cambridge University Press.

281 Ibid.

282 Inaugurated by UNSC Resolution 1265 (1999).

283 Inaugurated by UNSC Resolution 1261 (1999).

284 Chikuhwa, T. (2009). The Evolution of the United Nations Protection Agenda for Children: Applying International Standards. In S. Gates and S. Reich (eds), *Child*

embedding women's rights in conflict within the UNSC agenda occurred in 2000 with the adoption of Resolution 1325 by the UNSC.<sup>285</sup>

Noteworthy in the UNSC's definition of women's rights is the prominence of women's 'participation' throughout the WPS Resolutions. Its prominence is evidenced by the frequent use of the term and its invocation throughout the preambles and operative provisions of the resolutions.<sup>286</sup> The foundation was laid in Resolution 1325, which called in its first operative paragraph for greater participation by women in the maintenance and promotion of peace and security.<sup>287</sup> Initiatives such as the request in Resolution 1889 for the UNSG to submit to the UNSC a report specifically on the theme of women's participation in peacebuilding<sup>288</sup> reiterate and reinforce this focus on participation. Further, the resolutions include a focus on substantive issues, such as increased programmatic attention to gender-sensitive humanitarian relief, which addresses the needs of displaced and refugee women and girls, an awareness of

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*Soldiers in the Age of Fractured State* (pp.42). Pittsburgh: University of Pittsburgh Press.

285 UNSC Resolution 1325 (2000).

286 See further O'Rourke, C. (2014). 'Walk[ing] the Halls of Power'? Understanding Women's Participation in International Peace and Security. *Melbourne Journal of International Law*, 15(2), 128-154.

287 UNSC Resolution 1325 (2000), paragraph 1.

288 UNSC Resolution 1889 (2009), paragraph 19.



women's caring responsibilities in humanitarian aid and increasing resources for the prevention of, and rehabilitation from, sexual violence.<sup>289</sup>

Resolution 1325 talks about sexual violence as one of a range of programmatic issues to be addressed, including HIV/AIDS, repatriation, resettlement and reintegration, conflict reconstruction, refugee camps, DDR of women and girls and the operation of the constitution, electoral system, police and judiciary.<sup>290</sup> However in the subsequent Resolutions, several other policy issues come to be refracted through the lens of sexual violence.<sup>291</sup> While Resolution 1325 is justly celebrated for its focus on women's agency, subsequent resolutions have operationalized a narrower definition of women's rights, principally focused on advancing accountability for sexual violence in armed conflict, raising concerns about the narrowness of the definition of women's rights in fact underpinning related UNSC activity.<sup>292</sup>

The UNSC has not specifically defined sexual violence—it refers to the targeting of civilians, including women and children, for 'rape and other acts of sexual violence' or 'sexual and gender-based violence', yet the requirements of a 'conflict nexus' have been diverse and evolving. First, the UNSC has a prescriptive definition of sexual violence that meets the threshold of 'threat to international peace and security' and thus potentially activates the UNSC's Chapter VII powers, such as sanctions. This

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289 For a breakdown of their substantive focus, see O'Rourke (n 286).

290 UNSC Resolution 1325 (2000), paragraphs 6, 8, 12.

291 See, for example, UNSC Resolution 1820 (2008); UNSC Resolution 1888 (2009), paragraphs 3, 13, 17.

292 For an overview of this trajectory, see O'Rourke (n 286).

definition is limited to ‘sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations’.<sup>293</sup> The language of Resolution 1820 (2008) was repeated in Resolutions 1888 (2009),<sup>294</sup> 1960 (2010),<sup>295</sup> and 2106 (2013).<sup>296</sup> The framework of Resolution 1820 thus limits what type of sexual violence can trigger the application of Chapter VII enforcement measures to widespread and systematic practices, or to tactics of war. The definition is prescriptive in terms of both the scale of sexual violence and the direct conflict nexus required.

More open and evolving is the definition of sexual violence and conflict nexus that underpins the UNSC’s thematic reporting and documentation of sexual violence in conflict. Whilst Resolutions 1820 and 1888 initially mandated the Secretary-General to report to the UNSC only on sexual violence in situations on its agenda,<sup>297</sup> Resolution 1960 requested:

the Secretary-General to include in his annual reports submitted pursuant to resolutions 1820 (2008) and 1888 (2009) detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of sexual violence,

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293 UNSC Resolution 1820 (2008), paragraph 1.

294 UNSC Resolution 1888 (2009), paragraph 19.

295 UNSC Resolution 1960 (2010), paragraph 7.

296 UNSC Resolution 2106 (2013), paragraph 13.

297 UNSC Resolution 1820 (2008), paragraph 15; UNSC Resolution 1888 (2009), paragraph 27(2).

thereby broadening the definition to also include sexual violence perpetrated in situations of armed conflict not on the agenda of the UNSC.

Resolution 1960 was significant in the UNSC's definition of sexual violence and conflict nexus also for introducing to the WPS resolutions the term 'conflict-related sexual violence'. Whilst the WPS resolutions had hitherto used prescriptive language on sexual violence and conflict nexus, Resolution 1960 established the Monitoring, Analysis and Reporting Arrangements (MARA) for 'conflict-related sexual violence', which included, but was not limited to, rape in situations of armed conflict.<sup>298</sup> Further, the reference to 'conflict-related sexual violence' expressly included post-conflict settings.

There are tensions between the protection and participation emphasis within definitions of women's rights advanced through the UNSC through the WPS resolutions. While a focus on women's political agency and participation was the initial impetus for the WPS agenda, later resolutions and – critically – initiatives towards enforcement have largely emphasized a protective focus on the protection of

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298 UNSC Resolution 1960 (2010), paragraph 8:

Requests the Secretary General to establish monitoring, analysis and reporting arrangements on conflict-related sexual violence, including rape in situations of armed conflict and post-conflict and other situations relevant to the implementation of resolution 1888 (2009), as appropriate, and taking into account the specificity of each country, that ensure a coherent and coordinated approach at the field-level.

women from ‘widespread and systematic sexual violence’.<sup>299</sup> Moreover, in its implementation of the WPS resolutions, the UNSC has largely resisted a broad definition of women’s rights in conflict, with some permanent members arguing that the WPS agenda applies only to the country situations on the agenda of the Council and not to all UN member states or conflict-affected settings.<sup>300</sup> Further, feminist observers have identified evidence of increasing securitisation of women’s rights emerging from the UNSC’s WPS agenda, most blatantly in efforts to integrate (or co-

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299 With three of resolutions connecting the Security Council’s activities to combat sexual violence with the use of force. That is, in paragraph one of the first three sexual violence resolutions the Security Council identifies systematic and widespread sexual violence as exacerbating conflict and as potentially impeding the maintenance of international peace and security. UNSC Resolution 1820, paragraph 1; UNSC Resolution 1888, paragraph 1; UNSC Resolution 1960, paragraph 1. The Security Council’s choice of language in this thrice-repeated paragraph implicitly invokes Chapter VII action, as a potential means to halt widespread and systematic sexual violence in conflict regions. See further Heathcote, G. (2016). *Robust Peacekeeping, Gender, and the Protection of Civilians*. In J. Farrall & H. Charlesworth (Eds.), *Strengthening the Rule of Law through the UN Security Council*. London and New York: Routledge.

300 See further text at nn 409-411.

opt) the WPS and the Council's counter-terror activities.<sup>301</sup> The concern is that women's rights issues—such as violence against women—have become defined and addressed according to the UNSC's mandate to maintain international peace and security, rather than in line with the experiences of women and girls and the fulfilment of their rights.<sup>302</sup> These dynamics and concerns raise important questions to be investigated through the case studies.

### **Monitoring Bodies and Enforcement Procedures**

An important feminist entry point into analysis of international law is the weaker monitoring bodies and enforcement procedures attached to women's rights.<sup>303</sup> This critique initially focused on IHRL and its implicit hierarchies between so-called 'first' and 'second' generation rights, which is understood to disproportionately impact

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301 See, for example, Ní Aoláin, F. (2016). The 'war on terror' and extremism: assessing the relevance of the Women, Peace and Security Agenda. *International Affairs*, 92(2), 275–291.

302 See, for example, Otto, D. (2009). The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade. *Melbourne Journal of International Law*, 10, 11.

303 For example Charlesworth, H. (1998). The Unbearable Lightness of Customary International Law. *American Society of International Law Proceedings*, 92, 44; Ní Aoláin, F., & Rooney, E. (2007). Underenforcement and Intersectionality: Gendered Aspects of Transition for Women. *International Journal of Transitional Justice*, 1, 338–354.

women due to gender dynamics of poverty.<sup>304</sup> Likewise, the historically weak enforcement mechanisms attached to CEDAW underpins feminist critique of human rights.<sup>305</sup> Selective enforcement of ICL, often to the exclusion of more ‘complex’ crimes such as sexual violence, is an established point of feminist discontent with the regime.<sup>306</sup> More recent iterations of the enforcement gap concerning women’s rights under international law emphasize the relative lack of enforcement procedures attached to the UNSC’s WPS resolutions.<sup>307</sup> Thus, monitoring and enforcement are established and enduring areas of feminist concern in international law.

What is most clear, however, is the relatively weak monitoring bodies and enforcement procedures attached to most measures designed to limit the impact of conflict on civilians. This broader deficiency of international law is, by some measure, most pronounced in respect of IHL. Indeed, it is likely that the absence of meaningful monitoring and enforcement procedures internal to the regime has been an important factor in discouraging feminist engagement. ICL is appropriately thought of

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304 Bunch, C. (1990). Women's Rights as Human Rights: Toward a Re-Vision of Human Rights. *Human Rights Quarterly*, 12, 486-498.

305 Cook, R. (1990). Reservations to the Convention on the Elimination of All Forms of Discrimination of Women. *Virginia Journal of International Law*, 30, 643-716.

306 de Londras, F. (2009). *Prosecuting Sexual Violence in the Ad Hoc International Criminal Tribunals for Rwanda and the former Yugoslavia*. UCD Working Papers in Law, Criminology & Socio-Legal Studies. Research Paper No. 06/2009. Dublin; Chappell (n 67).

307 O'Rourke & Swaine (n 235).

as the enforcement element of IHL, though it is inevitably selective in the constituency of victims, crimes and perpetrators ultimately reached. Further, its focus is on individual perpetrators. While IHRL has a highly developed system of monitoring state party treaty compliance, its enforcement capacities have certain inherent weaknesses, in particular when applied to either women's rights or conflict settings. Finally, the UNSC brings unique and remarkable enforcement potential to women's rights in conflict, yet these powers are exercised in line with the vagaries of geo-political dynamics, determined in particular by the five permanent members of the Council. Further, the evidence is that, while the WPS resolutions are speaking increasingly directly to the Council's various powers under Chapters VI and VII, it is nevertheless questionable as to whether the Council's exercise of its powers speak back to the WPS resolutions and the agenda more broadly. Moreover, arguably uniquely of the four regimes, it is the UNSC's enforcement powers – even when exercised ostensibly in pursuit of women's rights in conflict – that may carry significant potential of detrimental impact on the rights of women. These dynamics are explored more fully in this section.

### *International Humanitarian Law*

The most commonly identified weakness of IHL concerns its institutional structures and enforcement procedures. Grounded in a principle of reciprocity between armed actors, the regime operates without an effective monitoring body or enforcement procedure. Despite the gendered limitations of IHL, there is no doubt that IHL's under-enforcement poses a grave challenge to women's rights in conflict. According to the Geneva Conventions and Additional Protocols, three enforcement procedures

attend IHL, namely 'protecting powers', international fact-finding commissions and prosecutions. Yet these organs are not functioning. 'Protecting powers' are third party states that must be accepted by both parties to the conflict. In practice, third states are always reluctant to become formally involved. Further, the First Additional Protocol establishes an 'International Fact-Finding Commission' which may be charged by the belligerents with the task of fact-finding.<sup>308</sup> However, this provision has been called the 'sleeping beauty of the forest' and has to date never been activated. In the conflicts of the last 20 years, no international supervisory organ has been able to verify on the ground the numerous violations committed by belligerents.<sup>309</sup> Due to the limitations inherent to these procedures, Antonio Cassese concludes frankly: 'There is no effective mechanism for determining when a belligerent has violated IHL'.<sup>310</sup>

The chapter has noted IHL's gendered limitations, with little prospect of progress new law-making, as well as the public position of the ICRC that changing 'gendered power relations' is not within its mandate. Combined with these critical enforcement deficiencies, one might be forgiven for marginalising IHL as a regime for the meaningful protection and advancement of women's rights in conflict. Nevertheless, as this section reviews, the ICRC in practice plays a unique role in promoting compliance with IHL on the ground in conflict-affected settings, often with a large

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308 Protocol 1 (n 11), article 90.

309 Cassese, A. (2014). Current Challenges in International Humanitarian Law. *The Oxford Handbook of Law in Armed Conflict*. A. Clapham and P. Gaeta. Oxford & NY, Oxford University Press: 3-19. page 13.

310 Ibid, 12.



and relatively well-resourced country presence. Thus it is a critical actor for understanding the relationship between international law and women's rights in conflict.

The ICRC's activities fall into three broad categories, all of which implicate the protection of women's rights in conflict. First, the ICRC is expressly authorized under IHL to provide *humanitarian assistance* to wounded and sick combatants and civilian populations, subject to the consent of the parties to the conflict.<sup>311</sup> Thus, while IHL imposes an obligations on parties to conflict concerning civilian access to humanitarian aid,<sup>312</sup> in circumstances in which belligerent actors are failing to meet these obligations, the ICRC negotiates with the parties on matters relating to the supply of food for the civilian population: safe access to fields and crops, safe passage of food convoys, security of food assistance operations.<sup>313</sup> In addition to delivering

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311 First Geneva Convention (n 43), article 9, The same text is replicated across Second Geneva Convention (n 43), article 9, Third Geneva Convention (n 43), article 9 and Fourth Geneva Convention (n 43), article 10. Further, Common Article 3 provides that an 'impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict'. Under Protocol 1 (n 11), the ICRC 'may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the parties to the conflict'. See also International Committee of the Red Cross, Customary IHL Database, Rule 124B, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule124](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule124).

312 Discussed above under 'definitions of women's rights', see *infra* nn 156-161.

313 International Committee of the Red Cross (n 33), 85.

humanitarian assistance, therefore, such activities also support and encourage parties to comply with IHL. Likewise, the ICRC has interpreted its assistance mandate to include administering the central tracing and messaging service in order to reunite families, further promoting compliance with pertinent provisions of IHL.<sup>314</sup>

Second, the ICRC engages in *protection* activities, which is analogous to a monitoring role, but also involves direct representations to weapons bearers to encourage the cessation of named IHL violations. The Third Geneva Convention requires that states give it access to prisoners of war;<sup>315</sup> it conducts hundreds of confidential visits and authors numerous reports to monitor compliance by armies, security forces, and non-state armed groups with IHL. Its protection activities are largely conducted through its country field offices, which visit prisons and places of detention and monitor the behaviour of belligerent actors, in order to determine compliance with IHL, draft relevant reports and discuss recommendations with responsible authorities at different levels.<sup>316</sup> This monitoring role involves direct communication between the ICRC and those involved in armed conflicts (or other situations in which the ICRC plays a role, such as security detentions) about their past or current conduct. The ICRC engages in a highly confidential dialogue with targets in an attempt to end violations of IHL.

The ICRC's 'Doctrine 15' sets out the four steps in its communications with belligerent actors, namely Phase 1, a reminder of obligations issued to conflict parties upon the onset of conflict, set out in a confidential aide-memoire; Phase 2, bilateral

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314 See further *infra* Chapter 7.

315 Third Geneva Convention (n 43), article 126.

316 Ibid, 26.

confidential memoranda and discussions detailing compliance problems observed by the ICRC with IHL; Phase 3, mobilization of other actors: if confidential dialogue is not improving the treatment of IHL violations, the ICRC will engage with other actors, such as third party governments, international organisations and NGOs in order to cultivate other influences on conflict parties; Phase 4, public criticism either the quality of dialogue with a particular belligerent actor, or specifically naming IHL violations, is the last resort of the ICRC and only activated in a minority of situations.<sup>317</sup>

The reasons for the ICRC not more publicly calling out violations of IHL are closely connected to its humanitarian activities. Its ‘pragmatic’ approach to its activities favours remaining in-country and on-the-ground over the ‘naming and shaming’ tactics of, for example, human rights non-governmental organisations. As David Forsythe, leading scholar of the ICRC, observes:

[T]he organisation (the ICRC) was conscious of its need for cooperation from public authorities and therefore was careful not to proceed beyond the realm of their consent... [A]dvocacy groups like Amnesty International and Human Rights Watch, that also do not run service programmes inside states, believe in a more adversarial relationship with states that features attempted public pressure – the naming and shaming game. They believe in the necessity of

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317 Doctrine 15, reproduced in (2005) Action by the International Committee of the Red Cross in the event of violations of IHL or of other fundamental rules protecting persons in situations of violence, *International Review of the Red Cross*, 87, 858, 393–400.

uncomfortable conflict, while the ICRC's neutral protection is based on hope for quiet co-operation.<sup>318</sup>

Hence, the ICRC pursues compliance with IHL 'in a very particular manner'.<sup>319</sup> It does not take the form of public condemnation, but behind-the-scenes communication. Ratner characterises the approach of the ICRC principally as one of 'persuasion'.<sup>320</sup> Indeed, as he notes, the ICRC's 'compliance strategy' frequently avoids overt reference to IHL violations, or indeed to IHL. This *modus operandi* is closely determined by the challenges identified in the definition of conflict and sources of law discussion, namely states typically resist conceding the application of IHL to an internal conflict, due to reputational and other costs.

It should be noted that the ICRC does not confine its humanitarian assistance activities to settings in which an armed conflict prevails. The ICRC draws on its own statutes – as distinct from IHL – to ground its mandate to operate in other situations of

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318 Forsythe, D. (2007). 'The ICRC: A Unique Humanitarian Protagonist.' *International Review of the Red Cross* 89 (865): 63-96, 72.

319 Sivakumaran, S. (2012). *The Law of NIAC*. Oxford: Oxford University Press, 472.

320 Ratner, S. R. (2011). Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War. *European Journal of International Law*, 22(2), 459-506.

violence.<sup>321</sup> It is also, however, subject to state consent. In the event of internal disturbances and tensions, and in any other situation that warrants humanitarian action, the ICRC also enjoys a right of initiative. Thus, wherever IHL does not apply, the ICRC may offer its services to governments without that offer constituting interference in the internal affairs of the state concerned.<sup>322</sup> The language of ‘internal disturbance’ is therefore pragmatically invoked by the ICRC in settings in which it wishes to discharge its protection and assistance mandate and work to commit belligerent actors to actual compliance with IHL principles, if not formal commitment to its legal strictures.

Third, the ICRC engages in IHL *promotion* activities. It issues public interpretations of the law; and it actively supports new rules in many areas. The ICRC thus regards itself as the ‘promoter and guardian of IHL’.<sup>323</sup> The ICRC promotes IHL by educating state and armed non-state armed groups about implementing IHL through legislation,

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321 Statutes of the International Red Cross and Red Crescent Movement, articles 5(2)(d) and 5(3); Statutes of the International Committee of the Red Cross, article 4(2).

322 See further Shucksmith, C. (2017). *The International Committee of the Red Cross and its Mandate to Protect and Assist: Law and Practice*. Oxford and Portland: Hart Publishing, 13.

323 ‘What is the ICRC’s role in Ensuring Respect for Humanitarian Law?’, 1 January 2004, available at: <http://icrc.org/web/eng/siteeng0.nsf/htmlall/5kzmkkm?opendocument>, cited in Ratner (n 320).

military manuals, and training.<sup>324</sup> In its education and training of participants in armed conflicts, the focus is on translating the norms of IHL (regardless of the state's ratification status or domestic law) into doctrine, operational policies, and rules of engagement. Having recognized the need for contact with non-state armed groups, for at least a decade it has attempted to teach them about IHL as well. Such an initiative presents special challenges because the groups typically operate clandestinely, often have unusual hierarchical structures, and may prove unfamiliar with or suspicious about IHL (for example, seeing it as a tool of states against rebel groups).<sup>325</sup>

The value of the ICRC's confidential and pragmatic approach has been recognised. For example, the ICTY has determined that the ICRC has a right under customary international law to non-disclosure of confidential information in the possession of ICRC employees.<sup>326</sup> Likewise, Rule 73 of the ICC's Rules of Procedure and Evidence reflect this same commitment to protecting the unique confidential activity of the ICRC in conflict-affected settings. To quote Schucksmith:

The ICRC... must remain very remote from any kind of judicial activities, as it must not be perceived as documenting violations in order to feed prosecutions... If suspicions were raised of such a situation, then the dialogue

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324 See further, Kellenberger, J. (2014). The Role of the International Committee of the Red Cross. *The Oxford Handbook of Law in Armed Conflict* A. Clapham and P. Gaeta. Oxford & NY, Oxford University Press: 20-36.

325 Ratner (n 320), 468.

326 *Prosecutor v Simic et al*, IT-95-9-PT, Decision on the prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

that the ICRC has established on the ground would be ruined. This would have repercussions, not only from the perspective dissemination of IHL to those involved in conflict, but also for the people relying on the protection and assistance of the ICRC.<sup>327</sup>

This important distinction between the ICRC's confidential activities with belligerent actors and the pursuit of prosecutions can also be justified on pragmatic grounds. It does nevertheless present something of a quandary when seeking to understand the organisation charged to be the 'guardian' of IHL: it works directly with armed actors to prevent and mitigate IHL violations, but cannot work post facto to secure accountability for the most serious violations of IHL. Likewise, it is 'guardian' of IHL but strategically avoids naming IHL violations, often even in private, and remains strategically silent as to whether IHL applies to particular country and conflict-settings. Together, these dynamics has led some observers to conclude that Geneva law is as far from country office activities as their physical distance from Geneva.<sup>328</sup>

Finally, the proliferation of international criminal courts and tribunals has contributed significantly to enforcement opportunities for the laws of armed conflict. IHL is no longer seen as a law with no means of enforcement or accountability, but rather as a dynamic source of obligations for both States and individuals in their conduct in armed conflicts, both international and non-international. Thus, in practical terms, there is little observable enforcement of IHL in specific conflicts other than

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327 Shucksmith (n 322), 162.

328 For example, Forsythe, D.P. (2005). *The Humanitarians: The International Committee of the Red Cross*. Cambridge & New York: Cambridge University Press.

prosecution under ICL. However, while international criminal justice offers enforcement bodies and procedures, it is hardly clear yet that is effective as a preventative dimension,<sup>329</sup> further emphasizing the importance of the ICRC's protection and promotion activities.

### *International Criminal Law*

It is, at least in part, the weakness of the monitoring and enforcement procedures attached to IHL that has underpinned extensive feminist focus, engagement and legal advocacy under ICL. ICL has offered a means to respond to widespread impunity for the most serious violations of IHL. Moreover, through the existence of formalised criminal tribunals, ICL has offered clear institutions to target advocacy and intervention. Feminist actors have frequently been to the forefront of calls for prosecutions for international crimes.<sup>330</sup>

Enforcement activity under ICL is epitomised by the International Criminal Court, established by the 1998 Rome Statute. In addition, it can be argued that the Office of the Prosecutor plays a monitoring role through its mandate to consider all credible evidence of wrongdoing in order to determine whether authorisation should be sought

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329 Kellenberger (n 324), 25.

330 See, for example, Copelon, R. (1994). Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law. *Hastings Women's Law Journal*, 5(2), 243-266.



from the Court to proceed to an investigation.<sup>331</sup> To this end, the Prosecutor is authorised to seek further information from states, UN organs, national and international non-governmental organisations and any other credible source.<sup>332</sup> In practice, the Office of the Prosecutor operates quite publicly about the countries either being considered for investigation and under investigation, thereby prompting further scrutiny of those conflict-settings.<sup>333</sup> The Informal Expert Paper on Complementarity advocates two underpinning principles, namely partnership (with national jurisdictions) and vigilance.<sup>334</sup> The principle of ‘vigilance’ speaks to the Office of the Prosecutor’s monitoring role: ‘The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of bona fides and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the

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331 Rome Statute (n 43), article 15(2).

332 Ibid, article 15(2). See further International Criminal Court Office of the Prosecutor. (2013). Policy Paper on Case Selection and Prioritisation. The Hague, ICC-OTP.

333 See, for example, the Colombian case: Urueña, R. (2017). Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017. *American Journal of International Law*, III(1), 104-125.

334 International Criminal Court Office of the Prosecutor. (2003). Informal Expert Paper: The Principle of Complementarity in Practice. The Hague, ICC-OTP, paragraph 1.

Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction.’<sup>335</sup>

Further complicating the study of monitoring and enforcement under ICL is its diffuse practice across domestic, hybrid and international courts. Thus, ICL is not only made and enforced at The Hague, rather it occurs in domestic jurisdictions in several settings. Indeed, the first prosecutor to the ICC asserted that the Court’s success will be measured by a reduction, not an increase, in the number of prosecutions proceeding through the ICC.<sup>336</sup> This claim is due to the nature of the court’s contingent jurisdiction and the principle of ‘complementarity’, which provides that the court may only pursue prosecutions in the event that the state in which the crimes are occurring is ‘unwilling or unable’ to pursue prosecutions.<sup>337</sup> Thus the Court espouses ‘complementarity’ in two senses: first, as an instrument to overcome sovereignty fears against the exercise of jurisdiction by the Court and as a tool to remedy shortcomings or failures of domestic jurisdiction through application of the criteria listed in article 17; and second, through the more diffuse concept of ‘positive complementarity’, in which the Court might encourage genuine national proceedings rather than placing the onus on ICC proceedings, thereby encouraging nation states to

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335 Ibid.

336 Quoted *ibid*, paragraph 1.

337 Rome Statute (n 43), article 17.

emulate the investigative and prosecutorial approaches of the Court in the pursuit of improved domestic criminal accountability for international crimes.<sup>338</sup>

The principle of complementarity lies at the heart of the functioning of the ICC. Pursuant to this principle, the ICC monitors the primary jurisdiction of national courts.<sup>339</sup> ‘The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes.’<sup>340</sup> The first experiences of the ICC in respect of the principle of complementarity immediately gave rise to serious questions. The first three investigations of the ICC Prosecutor – the Democratic Republic of the Congo, the Central African Republic, and Uganda – were triggered by referrals made by those states pursuant to article 14 of the ICC Statute.<sup>341</sup> Negotiated self-referrals while not

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338 Stahn, C. (2007). Complementarity: A Tale of Two Notions. *Criminal Law Forum*, 19, 87-113; see also El Zeidy, M. (2001-2002). The Principle of Complementarity: A New Machinery to Implement International Criminal Law. *Michigan Journal of International Law*, 23, 869-975.

339 The standards of review and the practical application of the principle are the object of Article 17 of the Rome Statute. See further International Criminal Court Office of the Prosecutor (n 334).

340 Ibid, paragraph 2.

341 *Decision assigning the situation in Uganda to Pre-Trial Chamber II*, Case No. ICC-02/04, ICC, Presidency, 5 July 2004; *Decision Assigning the Situation of the DRC to Pre-Trial Chamber I*, Case No. ICC-01/04, ICC, presidency, 5 July 2004;

against the letter of the Statute, may be against the spirit of the principle of complementarity, the basis of which is the primary duty of states to investigate and prosecute international crimes. The risk of ‘selective or asymmetrical self-referrals’ is an obvious one. The self-referrals were directed at crimes committed by rebels in a civil war situation, suggesting that states are using the Court to expose rebels internationally and to dispose of them through the judicial processes of the ICC.<sup>342</sup> The selectivity of these actions raises broader legitimacy questions about the operation of the Court.<sup>343</sup>

The specific implications of the complementarity regime for the protection and promotion of women’s rights in conflict has been the subject of important critical feminist analysis.<sup>344</sup> The Statute institutes a complementarity regime, as well as specifically criminalizing a range of sexual and gender-based violations. However, according to Chappell and colleagues, the Statute fails to link these two innovative provisions, leaving a ‘gender justice complementarity shadow’. They argue that the Office of the Prosecutor’s apparent inattention to gender biases underpinning

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*Decision Assigning the situation in the Central African Republic to Pre-Trial Chamber III*, Case No. ICC-01/05, ICC, Presidency, 19 January 2005.

342 See especially Cassese, A. (2006). ‘Is the ICC still having teething problems?’ *Journal of International Criminal Justice*, 4, 436.

343 Schabas, W. ‘Does International Criminal Justice have a Future?’, Transitional Justice Institute Annual Summer School Public Lecture, Ulster University, 15 June 2016.

344 Chappell, Grey & Waller (n 67). See generally Chappell (n 67).

domestic legal systems has left impunity for perpetrators of sexual violence intact and the victims of these crimes unrecognized. To tackle impunity for sexual violence through complementarity therefore requires the ICC prosecutor to include an examination of gender biases in domestic legal systems when testing state action, willingness and ability in order to understand how these biases impede access to justice for victims of sexual violence.<sup>345</sup> Some creative advocates have sought to move the Prosecutor further in this direction.<sup>346</sup>

ICL offers the clear appeal to anti-impunity advocates of individual criminal accountability for specific perpetrators of international crimes. It is accountability and justice in the classic sense of the term. Thus, there is robustness to enforcement activities under ICL that may have little parallel in other regimes of relevance. It bears reflection, nevertheless, that ICL enforcement activities pursued at the international level are by necessity highly selective in terms of perpetrators – and thus victims and violations – formally reached.

### *International Human Rights Law*

IHRL derives primarily from international and regional human rights treaties. The international system for the protection of human rights contains both treaty-based elements, established by human rights treaties, and so-called ‘Charter-based’ elements, grounded in the human rights provisions of the UN Charter. Whereas the human rights treaties establish legal obligations on states that are monitored by bodies

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345 Ibid.

346 See further discussion *infra* Chapter 6.

of independent experts, the Charter-based system is driven primarily by states and thus constitutes a peer-led system of political accountability. With the book's focus on international law, the activities of the human rights treaty bodies are prioritised for discussion here and in the case studies. Nevertheless, the Charter-based bodies can prove important in the pursuit of political accountability where legal avenues have proven unfruitful. Thus, the section concludes with a brief discussion of the key Charter-based protections for human rights.

There are four broad monitoring and enforcement activities under international human rights treaties. Although their specifics vary, these activities are, first, periodic examination of state party compliance; second, 'monitoring plus' activities calling attention to an acute rights issue outside of the normal periodic report cycle; third, hearing individual petitions alleging rights violations; and fourth, conducting inquiries into alleged 'grave or systematic' violations of the treaty.<sup>347</sup> For reasons of economy and practicality, discussion in this section focuses on the operation of the CEDAW Committee, as illustrative of the broader *modus operandi* of human rights treaty monitoring and enforcement.

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347 The authority to conduct inquiries into 'grave or systematic' alleged violations was unique to the Committee Against Torture until the adoption of the Optional Protocol to CEDAW in 2000. Consequently, the Human Rights Committee and CERD, for example, do not have the authority to conduct inquiries. Since 2000, the inquiry procedure is routinely included in newer human rights treaties, though with state discretion to opt-out of such provisions if they wish, see for example Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, 2518 UNTS 283, article 8.

The entry into force of the CEDAW Convention in 1981 established a treaty-based system of state accountability for an enumerated list of women's human rights, involving the periodic review of state compliance<sup>348</sup> by an independent committee of experts.<sup>349</sup> Both in law and in practice, the Committee's mechanisms for state accountability continue to operate during conflict and civil unrest. Most importantly, the Committee has led the periodic review of state compliance with obligations under the Convention. For example, in its monitoring activities of periodic state reporting, the Committee has drawn attention to levels of women's representation in post-conflict democratic institutions<sup>350</sup> and has likewise urged state parties to ensure the inclusion of women in ongoing peace processes within state parties jurisdiction.<sup>351</sup> Moreover, the Committee has drawn attention to the impact of conflict on substantive rights guaranteed under the Convention, such as the right of women and girls to

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348 CEDAW (n 74), article 18.

349 Ibid, article 17.

350 Committee for the Elimination of All Forms of Discrimination against Women. (2007). Concluding Observations to Serbia. UN Doc. CEDAW/C/SCG/CO/1; Committee for the Elimination of All Forms of Discrimination against Women. (2009). Concluding Observations to Rwanda. UN Doc CEDAW/C/RWA/CO/6.

351 Committee for the Elimination of All Forms of Discrimination against Women. (2005). Concluding Observations to Israel. UN Doc. CEDAW/C/ISR/CO/3, paragraph 22; Committee for the Elimination of All Forms of Discrimination against Women. (2006). Concluding Observations to Cyprus. UN Doc. CEDAW/C/CYP/CO/5, paragraph 270.

education on a basis of non-discrimination.<sup>352</sup> Further, the Committee has enhanced these periodic reporting procedures through the activation of what might be termed ‘monitoring-plus’ activities. These have taken the form of ‘statements’ addressing particular women’s human rights situation of concern.<sup>353</sup>

The structural weaknesses historically associated with the Convention, due to the lack of any associated enforcement procedures, have been ameliorated in important ways through the entry into force of the Optional Protocol to the Convention in December 2000. Enforcement activities for conflict-related violations have, to date, been limited. The Committee has, however, been consistent in rejecting any claim by states that

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352 Conflict featuring in Committee for the Elimination of All Forms of Discrimination against Women. (2007). Concluding Observations to Sierra Leone. UN Doc. CEDAW/C/SLE/CO/5, paragraph 30; Committee for the Elimination of All Forms of Discrimination against Women. (2007). Concluding Observations to Colombia. UN Doc. CEDAW/C/COL/CO/6, paragraph 30; Committee for the Elimination of All Forms of Discrimination against Women. (2009). Concluding Observations to Liberia. UN Doc. CEDAW/C/LBR/CO/6.

353 For example, Committee for the Elimination of All Forms of Discrimination against Women. (2009). Statement on the situation in Gaza. UN Doc. A/64/38 (supp) Annex II; Committee for the Elimination of All Forms of Discrimination against Women. (2010). Statement on the Inclusion of Afghan Women in the Process of Peace Building, Security and Reconstruction in Afghanistan. UN Doc. /E/CN6/2010/CRP 2 Annex V 199.



issues of asylum are not addressed by the Convention.<sup>354</sup> Further, while all of the asylum petitions to the Committee were held inadmissible on the basis that the applicant had either failed to exhaust domestic remedies or failed to sufficiently substantiate the alleged violation, further jurisprudence may illuminate whether more flexible standards are applied to both requirements in the case of individual petitions emerging from conflict-affected settings, where domestic legal systems are likely to be debilitated and the ability to gather evidence hampered. Likewise, the Committee has not yet activated the Optional Protocol's inquiry procedure in order to investigate conflict-related 'grave or systematic violations' of CEDAW. Nevertheless, the consistent line of the Committee's inquiry activity has been to investigate and hold state parties to account for violence against women by non-state actors,<sup>355</sup> which has likely relevance for its approach to 'grave or systematic violations' occurring in conflict-affected settings.

Further questions concerning the efficacy of human rights monitoring and enforcement procedures concern the apparent impotency of treaty monitoring bodies in the face of the defiant state. One such example is the responsibility for the human and political rights of Palestinian women in the Occupied Palestinian Territories (OPT). In the periodic reports submitted by the State of Israel to CEDAW since its ratification in 1991, Israel's stated position is that 'the Convention does not apply

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354 *Y.W. v. Denmark*, Communication No. 51/2013, UN Doc. CEDAW/C/60/D/51/2013 (2015); *S.O. v. Canada*, Communication No. 49/2013, UN Doc. CEDAW/C/59/D/49/2013 (2014).

355 *Ibid.*

beyond its own territory,’ and on this basis it refuses to report on the OPT or respond to questions about women in those areas.<sup>356</sup> In 2005, the CEDAW committee rejected this position and urged Israel to reconsider its obligations ‘in regard to all persons under its jurisdiction, including women in the Occupied Territories’.<sup>357</sup> Despite CEDAW Committee and civil society activity, Israel continues to deny its obligations under the Convention in the OPT. This is one amongst many possible illustrations of the limits of the Committee’s powers, and indeed of human rights treaty-monitoring bodies more broadly.

The Charter-based human rights system comprises the human rights principles and institutional mechanisms that different UN organs have developed in the exercise of their UN Charter powers. Since 1946, the primary Charter-based vehicle for the protection and promotion of human rights was the Commission on Human Rights, which consisted of 54 UN member states elected on a rotating basis (and subsequently

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356 Committee for the Elimination of All Forms of Discrimination against Women. (2005). Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth periodic report of States parties, Israel, UN Doc. CEDAW/C/ISR/4; Committee for the Elimination of All Forms of Discrimination against Women. (2011). Concluding observations of the Committee on the Elimination of Discrimination against Women, Israel. UN Doc. CEDAW/C/ISR/CO/5, paragraph 12.

357 Committee for the Elimination of All Forms of Discrimination against Women. (2005). Concluding Observations to Israel. UN Doc. CEDAW/C/ISR/CO/3, paragraph 24.

reconceived and re-named as the Human Rights Council in 2006).<sup>358</sup> Charter-based mechanisms and procedures thus emerge from intergovernmental negotiation and multi-lateral agreement. The adoption of so-called ‘special procedures’, which are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective, are central to Charter-based monitoring and enforcement activities.<sup>359</sup> These special procedures can be individual Special Rapporteurs, Working Groups of independent experts,<sup>360</sup> commissions of inquiry, or fact-finding missions.<sup>361</sup> Special procedures are more clearly determined and circumscribed by ongoing political bargaining amongst states: their mandates are established, renewed and amended on a continuing basis that guarantees consistent

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358 Alston, P. (2006). Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council. *Melbourne Journal of International Law* 7(1), 185–224, 185-187;

359 Buergenthal, T. (1997). The Normative and Institutional Evolution of International Human Rights. *Human Rights Quarterly* 19(4), 703-723, 709.

360 Such as the Working Group on Enforced or Involuntary Disappearances (WGEID) as established by the UN Commission on Human Rights in Resolution 20 (XXXVI) of 29 February 1980, see further *infra* Chapter 7.

361 United Nations Office of the High Commissioner on Human Rights (OHCHR). (2015). Commissions of Inquiry and Fact-Finding Mission on International Human Rights and Humanitarian Law: Guidance and Practice. New York and Geneva: OHCHR.

political influence by states – that is not the case of treaty-based mechanisms, which typically assert a good degree of autonomy once established.

Charter-based human rights mechanisms offer the advantage (from a promotion and protection perspective) that they do not require specific treaty ratification in order to initiate scrutiny of the behaviour of a specific state. Further, they do not require the negotiation of new treaties in order to address new or emerging human rights challenges, thus can act with greater dynamism. On the same grounds, however, their activities occupy an unclear legal status and such institutions operate at considerable distance from state consent, a factor generally believed to reduce both legitimacy and the likelihood of state compliance.<sup>362</sup>

Efforts to improve coherence across the human rights treaties, in addition to broader political dynamics, led to the introduction of some significant additional monitoring and enforcement mechanisms in the international human rights system in 2006.<sup>363</sup> The re-constitution of the Commission on Human Rights as the Human Rights Council introduced a new peer monitoring and enforcement mechanism for the panoply of human rights treaties, namely Universal Periodic Review.<sup>364</sup> Further, the Human Rights Council retains the capacity to establish commissions of inquiry and fact-

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362 Gutter, J. (2007). Special Procedures and the Human Rights Council: Achievements and Challenges Ahead. *Human Rights Law Review*, 7, 93. 98-99.

363 UN General Assembly. (2006). Resolution 60/251.

364 Mandated by *ibid.* See further ‘Basic Facts about the UPR’ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

finding missions on IHR. <sup>365</sup> Finally, of the special procedures, the Special Rapporteur on Violence Against Women<sup>366</sup> has arguably been the most important, as an influential advocate for women's rights in armed conflict. The office-holder has brought both greater scrutiny to women's rights in conflict,<sup>367</sup> as well as a further procedure for individual complaints.<sup>368</sup>

*United Nations Security Council*

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365 See generally United Nations Office of the High Commissioner on Human Rights (n 361).

366 Human Rights Council. (2006). Resolution 23/25. Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence. UN Doc. A/HRC/RES/23/25.

367 See especially United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (2003). Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women. UN Doc. E/CN.4/2003/75.

368 Note that the authority to consider individual complaints is not included in the formal mandate for the role, Commission on Human Rights, Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women Resolution 1994/45. Rather it has emerged as part of the office practice, see further <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx>.

The UNSC's expanding role in normative and legal developments on women's rights in conflict brings robust enforcement potential to responses to violations. Under the Charter, it is the UNSC that bears 'primary responsibility for the maintenance of international peace and security'.<sup>369</sup> While the UNSC's powers are not absolute, they are very far-reaching. If the Council determines the existence of a threat to the peace, breach of the peace, or act of aggression,<sup>370</sup> it can make recommendations,<sup>371</sup> order provisional measures,<sup>372</sup> or take non-military or military enforcement measures according to the exigencies of the particular situation. Envisaged as the enforcement body of the United Nations, the UNSC has unique authority to make decisions that bind all UN member states<sup>373</sup> and extraordinary powers that include sanctions, peacekeeping and authorisation of the use of force.<sup>374</sup> Further, it has a general power to establish 'such subsidiary organs as it deems necessary for the performance its functions'.<sup>375</sup> It is for these reasons that commentators have referred to the UNSC's

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369 UN Charter (n 69), article 24 (1).

370 Ibid, article 39.

371 Ibid, article 40.

372 Ibid.

373 Ibid, article 25.

374 Ibid, article 42.

375 Ibid, article 29.

role as an ‘executive of the international community’<sup>376</sup> or even of an ‘international government’.<sup>377</sup>

Under Chapter VI of the UN Charter, the Council has the capacity to recommend a wide range of pacific measures for the settlement of disputes. The thrust of Chapter VI is that Council should investigate situations that have conflict potential at an early stage, well before they erupt into inter-state conflict.<sup>378</sup> The Council under Chapter VI is given broad latitude to determine that conditions within a state might hold the seeds to international conflict. Article 33 sets out a range of measures whereby the UNSC may support parties to a dispute to reach pacific settlement, namely: negotiation, fact-finding, mediation (to include ‘good offices’), conciliation, arbitration, judicial settlement and ‘other peaceful means’.<sup>379</sup> In practice, the Council most frequently

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376 Dupuy, PM, ‘The Constitutional Dimension of the Charter of the UN Revisited’, *Max Planck UNYB* 1 (1997), pp. 21-4.

377 Morgenthau, *Politics Among Nations* (1948), 380.

378 Luck, E. C. (2006). *UN Security Council: Practice and Promise*. London and New York: Routledge, 21.

379 These options, and the Council’s interpretation and related activities, are discussed Simma et al (n 104), 588-90. UN Charter (n 69), article 34: UNSC can investigate whether the continuance of any dispute is likely to give rise to endangerment of international peace and security; UNSC can recommend appropriate procedures or measures of adjustment (article 36(1)), but Council should recommend legal disputes to the ICJ (art 36(3)); article 38, where the parties to the dispute so request, UNSC can recommend terms of settlement.

suggests that contending parties enter into negotiations.<sup>380</sup> The Council encourages, in almost all cases, stakeholders to engage in inclusive political dialogue as a means of creating an environment conducive to the holding of elections,<sup>381</sup> negotiations,<sup>382</sup> peace and reconciliations processes,<sup>383</sup> discussions<sup>384</sup> or the strengthening of national unity and dialogue over key aspects such as internal boundaries.<sup>385</sup>

During the period of the Cold War, when there was insufficient consensus at the Council to robustly exercise its Chapter VII enforcement powers, the indeterminacy of Chapter VI was exploited to advance a broad set of non-coercive peacemaking activities, most significantly the deployment of country-specific peacemaking

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380 Examples abound: Iraq and Iran were asked to accept mediation, conciliation, or other forms of peaceful settlement. UNSC Resolution 479 (1980) and UNSC Resolution 582 (1986). The Council suggested having a dispute settled by arbitration, for the Suez Canal dispute, UNSC Resolution 118 (1956).

381 UNSC Resolution 2065 (2012), Preamble; UNSC Resolution 2088 (2013), paragraph 11; UNSC Resolution 2090 (2013); and UNSC Resolution 2103 (2013), Preamble.

382 UNSC Resolution 2044 (2012), paragraph 5.

383 UNSC Resolution 2041 (2012), paragraph 13; UNSC Resolution 2067 (2012), paragraph 2.

384 UNSC Resolution 2058 (2012), paragraph 1.

385 UNSC Resolution 2061 (2012), Preamble.



missions to consenting states.<sup>386</sup> Peacekeeping by consensus under Chapter VI mushroomed in the 1990s, with their functions being considerably expanded (Cambodia, El Salvador, Mozambique, Yugoslavia).<sup>387</sup> As consent of the parties is essential, the right of these missions to use force is a problematic issue.<sup>388</sup> In the Congo, a concept which could be called active self-defence was developed. The force would assert its right of freedom of movement and any attempt to hinder the exercise of this right could be countered with force in the name of self-defence.<sup>389</sup> Their characterisation has nevertheless caused some legal issues: while they are supposed to be mandated under Chapter VI, their military character can give the feel of Chapter VII. Hence, the language of 'Chapter VI ½' has emerged. A further such example is the UNSC's establishment of UN transitional administrations in East Timor, Kosovo and eastern parts of Croatia. A UN administration would constitute an 'appropriate procedure or method of adjustment' which the Council could recommend under article 36.<sup>390</sup> Likewise, under Chapter VII, article 41 allows a broad range of different

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386 Luck (n 378), 31.

387 So-called second generation peacekeeping, for example, 'verification' missions in Angola, El Salvador (ONUSAL, 1991-95), Cambodia (UNAMIC and UNTAC, 1991-93), Mozambique, Haiti (with special focus on law enforcement), see further Simma et al (n 104), 682.

388 Ibid, 682.

389 Ibid, 683.

390 Ibid, 685.

measures. The establishment of a UN administration certainly qualifies as a ‘measure not involving the use of armed force’ in the sense of this provision.<sup>391</sup>

As the WPS agenda evolves, there is evidence of WPS resolutions trying to engage broader recommendatory and enforcement functions and powers of the UNSC. For example, Resolution 2106 (2013) additionally emphasized the importance of addressing sexual violence in armed conflict, in mediation efforts, ceasefires and peace agreements.<sup>392</sup> Further, in Resolution 2122 (2013), the Council invited United Nations-established Commissions of Inquiry investigating situations on the Council’s agenda to include in their briefings information on the differentiated impacts of armed conflict on women and girls. Resolution 2242 addresses the activities of the Council’s Counter-Terrorism Committee. There is less evidence, however, of this dynamic in reverse. The Council’s invocation of the WPS resolutions when recommending peaceful settlement of disputes, establishing Commissions of Inquiry or peacekeeping missions and imposing sanctions is uncommon and irregular.<sup>393</sup>

The WPS resolutions give rise to a series of specific monitoring procedures concerning related activities by the Council, the UN system and UN member states. The UNSC does not act as a monitoring body on state-level implementation of its

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391 Ibid, 685.

392 UNSC Resolution 2106 (2013), paragraph 12.

393 See, for example, the discussion of peacekeeping in United Nations. (2015). Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325, New York, 130-163.

resolutions or thematic issues, as it lacks a mandate, function and means for holding member states accountable to its resolutions.<sup>394</sup> The UNSC instead requests that the UN Secretary-General update the Council on implementation of the WPS resolutions through thematic annual reports.<sup>395</sup> Important to note is that, while these reports are compiled on the basis of information provided by member states on their implementation of the resolutions, state submissions to the reporting process are to the UN Secretary-General (not the UNSC) and cooperation with reporting is not mandatory on states. The reports are important informative outputs and offer significant observations on progress towards implementation. They are not, however, a modality through which member states are directly accounting to the UNSC for implementation of the resolutions.

Further, under article 29 of the Charter, the UNSC can empower subsidiary organs to advance monitoring and supervision on thematic and country-specific issues. (This article 29 authority, aligned to Chapter VII enforcement powers, underpinned the Council's establishment of the ICTY and ICTR.<sup>396</sup>) Among the subsidiary bodies established by the Council, some are devoted to overseeing various country-specific regimes, such as sanctions.<sup>397</sup> (Other working groups are focused on generic questions such as sanctions, peacekeeping, conflict prevention and resolution in Africa, children

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394 See further O'Rourke and Swaine (n 307).

395 UNSC Resolution 1325 (2000), paragraphs 16-17.

396 UNSC Resolution 955 (1994) establishing the ICTR and UNSC Resolution 827 (1993) establishing the ICTY.

397 For overview, see <https://www.un.org/sc/suborg/en/>.

and armed conflict, counter-terrorism and Council procedures.) In respect of so-called ‘thematic issues’ that have emerged as part of the UNSC activities, a Working Group has been established by the Council only on the theme of Children and Armed Conflict.<sup>398</sup> To date, the UNSC has not shown any appetite for pursuing the option of creating a specific body, such as a working group, to advance accountability by member states for the WPS agenda.

Engagement by the UNSC on the issue of sexual violence in armed conflict has been accompanied by more robust implementation measures, but focusing on the UN system – as distinct from member states – activities. Resolution 1820 (2008), which formally introduced sexual violence in armed conflict as a defining issue of WPS, was quickly followed by Resolution 1888 (2009), which established mechanisms for the earlier resolutions’ implementation and enforcement. Such mechanisms included the appointment of a Special Representative of the Secretary General to advance the UN’s work on addressing sexual violence in armed conflict,<sup>399</sup> as well as an annual thematic report from the Secretary-General to the Security Council on Sexual Violence in Armed Conflict<sup>400</sup> distinct from his report on WPS. Importantly, as noted, resolution 1960 (2010) established a monitoring, analysis and reporting framework (MARA) to document and tracks patterns of conflict-related sexual violence.<sup>401</sup> Resolution 1960 was also significant for establishing the ‘listing’ procedure whereby

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398 Established by UNSC Resolution 1612 (2005).

399 UNSC Resolution 1888 (2009), paragraph 4.

400 UNSC Resolution 1820 (2008), paragraph 15.

401 UNSC Resolution 1960 (2010), paragraphs 6, 8.

the Secretary-General was requested to, in the annex to his annual thematic reports, ‘list’ perpetrators of sexual violence in armed conflict.<sup>402</sup> This ‘listing’ procedure however is explicitly confined to situations on the agenda of the UNSC and is intended to inform, *inter alia*, relevant sanctions regimes.<sup>403</sup>

The UNSC’s power to enact sanctions is a distinct strength of the UNSC. While the General Assembly holds broad powers to make recommendations for actions relating to peace and security,<sup>404</sup> it concedes authority on measures of enforcement on these matters to the UNSC.<sup>405</sup> The use of mandatory sanctions is intended to apply pressure on a State or entity to comply with the objectives set by the UNSC without resorting to the use of force. The Council has resorted to mandatory sanctions as an

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402 UNSC Resolution 1960 (2010), paragraphs 3.

403 UNSC Resolution 1960 (2010), paragraph 3:

...and to list in an annex to these annual reports the parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda; expresses its intention to use this list as a basis for more focused United Nations engagement with those parties, including, as appropriate, measures in accordance with the procedures of the relevant sanctions committees;

404 UN Charter (n 69), articles 10, 11 and 12.

405 Beyerlin, U. (1995). The United Nations Sanctions Regime. In R. Wolfrun and C. Philipp (eds), *United Nations: Law, Policies and Practice, Volume 2*, (pp.1113). Dordrecht: Martinus Nijhoff Publishers.

enforcement tool when peace has been threatened and diplomatic efforts have failed. The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions.<sup>406</sup> Since the end of the Cold War, enforcement action under article 41 has become a common instrument of peace maintenance. The link between the WPS agenda and the sanctions committee was first made in resolution 1820 (2008) and reiterated in resolutions 1888 (2009), 1960 (2010), 2106 (2013) and 2242 (2015).<sup>407</sup> The UNSC created a formal role for the Special Representative of the Secretary-General on Sexual Violence in Conflict who regularly briefs the sanctions committee. The mandate of the Special Representative extends to naming and proposing individuals or entities to be sanctioned by the UNSC.<sup>408</sup>

To date, the UNSC has included sexual violence as a criterion in over half of its sanctions regimes.<sup>409</sup> Sanctions regimes are only invoked, however, where there is a distinct threat to the peace and where other measures have failed. It is thereby

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406 See further <https://www.un.org/sc/suborg/en/>.

407 For full discussion, see Security Council Report. (2013). Women, Peace and Security: Sexual Violence in Conflict and Sanctions. New York.

408 UNSC Resolution 1960 (2010), paragraphs 3, 7, 8; UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict. (2011). Provisional Guidance Note: Implementation of Security Council Resolution 1920 (2010) on Women, Peace and Security (conflict-related sexual violence). Stop Rape Now Campaign, <http://www.refworld.org/docid/4e23ed5d2.html>.

409 Security Council Report (n 407), 71.

distinctly and solely tied to the UNSC's definition of 'sexual violence, when used or commissioned as a tactic of war', and to the small number of country situations on the agenda of the UNSC.<sup>410</sup> While this offers significant progress in respect to enforcement of standards of protection of women's rights, the potential to use sanctions to enforce decisions of the UNSC regarding WPS are thereby restricted to situations that reach a certain threshold and are on the agenda of the UNSC.<sup>411</sup>

<b>IHL</b>	
ICRC	<ul style="list-style-type: none"> <li>• Humanitarian assistance</li> <li>• Protection: monitoring compliance by belligerent actors, including direct representation to weapons bearers and prison visits</li> <li>• Promotion: educating belligerent actors in IHL obligations and implementation</li> </ul>
Third party states	'Protecting powers'

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410 See, for example, UNSC Resolution 2262 (2016) on the situation in the Central African Republic.

411 Attempts to broaden these criteria have been rebutted by some permanent and non-permanent member states. See, for example, 'Statement by Russia', UN Security Council Meeting Record S/PV.6948 (17 April 2013). For broader analysis, see Security Council Report (n 407).

International Fact-finding Commissions	International supervisory organ to verify IHL violations
<b>ICL</b>	
ICC	Decision to proceed to investigation  Trials
OTP	Preliminary examinations  Investigations  Prosecutions
Ad hoc or hybrid tribunals	Limited temporal and geographical jurisdiction for prosecution of international crimes established by or with UNSC resolution
<b>IHRL</b>	
Treaty-based	Periodic reporting  'Monitoring plus': statements and requests for exceptional reports  Individual complaints  Inquiries into grave or systematic violations
Charter-based	Human Rights Council (formerly Commission on Human Rights)  Special Procedures



	<ul style="list-style-type: none"> <li>• Special Rapporteurs</li> <li>• Working Groups</li> <li>• Commissions of Inquiry</li> <li>• Fact-finding Missions</li> </ul> <p>Universal Periodic Review</p>
<b>UNSC</b>	
UN Security Council	<p>Chapter VI</p> <ul style="list-style-type: none"> <li>• Recommend pacific measures for the settlement of disputes, e.g. negotiation, fact-finding, mediation, conciliation, arbitration and judicial settlement</li> <li>• Peacekeeping</li> </ul> <p>Chapter VII</p> <ul style="list-style-type: none"> <li>• Sanctions</li> <li>• Use of Force</li> </ul> <p>Establish subsidiary organs for the performance of its functions, e.g. ad hoc tribunals, sanctions committees, Commissions of Inquiry, working groups</p> <p>Annual Thematic Reporting</p> <ul style="list-style-type: none"> <li>• Monitoring, Analysis and Reporting Framework (MARA) for conflict-related sexual violence</li> <li>• Monitoring and Reporting Mechanism (MRM) documenting grave violations of children's rights</li> </ul>

	<p>in armed conflict, including child soldier recruitment and sexual violence</p> <ul style="list-style-type: none"> <li>• ‘Listing’ of perpetrators</li> </ul>
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**Table 1. Monitoring Bodies and Enforcement Procedures for Women’s Rights in Conflict under International Law**

### **Conclusion**

The fragmentation of international law presents analytical challenges for studying the regulation of women’s rights in conflict. It is increasingly difficult to fully appreciate the ways in which international law sets and enforces rules, and provides accountability and redress, for violations of women’s rights in conflict. The book’s premise is that prevailing analysis of women’s rights in conflict under international law unduly consider individual regimes in isolation from one another, when they are more appropriately analysed in their interaction with one another. This chapter set out to improve analytical clarity, by providing a functional account of how the respective regimes differ along key lines. It is clear that the regimes offer different strengths and weaknesses in the regulation and protection of women’s rights in conflict. This is an important factor in the book’s overall argument that women’s rights in conflict are best pursued through productive synergies, interactions and reinforcements across the regimes of international law. Regime interdependencies and interaction in the regulation of women’s rights are identified and discussed in the next chapter.